

(29,091)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 541.

ROLAND C. HEISLER, PLAINTIFF IN ERROR,

vs.

THOMAS COLLIERY COMPANY, E. HERBERT SUENDER,
SUPERINTENDENT; JOHN GILBERT ET AL, &c., ET
AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
PENNSYLVANIA.

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1 The Answer of the Judges of the Supreme Court of Pennsylvania to the Writ of Error from the Supreme Court of the United States, Hereunto Annexed, as Follows, to wit:

2 *Writ of Error.*

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said *appeal* before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Roland C. Heisler, v. Thomas Colliery Company; E. Herbert Suender, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the

3 ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said Roland C. Heisler, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 12th day of July, in the year of our Lord one thousand nine hundred and twenty-two.

[Seal of the U. S. District Court, M. D. Penna.]

G. C. SCHEUER,

Clerk of the United States District Court.

Allowed by

ROBT. VON MOSCHZISKER,

*Chief Justice of the Supreme
Court of Pennsylvania.*

2

R. C. HEISLER VS. THOMAS COLLIERY CO. ET AL.

4

(Endorsement:) Supreme Court of the United States, October Term, 191-. Roland C. Heisler, Plaintiff-in-Error, vs. Thomas Colliery Company, E. Herbert Suender, Superintendent of Thomas Colliery Co. et al., Defendants-in-Error. Writ of Error. Filed in Supreme Court Jul. 12, 1922. Philadelphia.

5

Citation.

In the Supreme Court of Pennsylvania, May Term, 1922.

No. 15.

In Equity.

ROLAND C. HEISLER, Plaintiff in Error,

VS.

THOMAS COLLIERY COMPANY, E. HERBERT SUENDER, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants in Error.

UNITED STATES OF AMERICA, ss:

To the defendants above named, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty days from the date of the service of this citation, pursuant to a writ of error filed in the office of the Prothonotary of the Supreme Court of Pennsylvania, in the Middle District, wherein Roland C. Heisler is plaintiff in error and you are defendant in error, to show cause, if any there be, why the decree rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Witness, the Honorable, the Chief Justice of the Supreme Court of Pennsylvania, this 12 day of July 1922.

ROBT. VON MOSCHZISKER,

*Chief Justice of the Supreme
Court of Pennsylvania.*

6

(Endorsement:) No. 15. In the Supreme Court of Pennsylvania, May Term, 1922. Roland C. Heisler, Plaintiff in Error, vs. Thomas Colliery Company, E. Herbert Suender, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants in Error. Citation. And now, to wit, July 17, 1922,

service of the within citation is accepted on behalf of the Defendants in Error named therein. Geo. Ross Hull, First Deputy Attorney General of the Commonwealth of Pennsylvania. Filed in Supreme Court Jul. 12, 1922. Philadelphia.

7 *Docket Entries.*

Among the records and proceedings of the Supreme Court of Pennsylvania sitting in and for the Middle District before the Honorable Robert von Moschzisker, LL. D., Chief Justice, and his Associate Justices, at Harrisburg, beginning on the 21st Monday of the year, 1922, it is contained as follows to May Term, 1922:

Copy of Docket Entries.

Sitting in Equity.

No. 709. Equity Docket.

ROLAND C. HEISLER, Appellant,
vs.

THOMAS COLLIERY COMPANY, E. HERBERT SUENDER, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania.

Appeal of Plaintiff from Decree of Common Pleas of Dauphin County.

Feb. 17, 1922.	Appeal and affidavit filed.
" " "	Ex die exit writ rtble. 21st Monday of the year 1922.
Mar. 23, "	Case verbally advanced by Mr. Chief Justice Von Moschzisker to be heard in Philadelphia on Monday, April 17, 1922.
Mar. 27, 1922.	Certified to Eastern District in accordance with above order.
Apr. 11, 1922.	Record filed.
" " "	Assignments of Error filed at Philadelphia.
" 17, "	Argued at Philadelphia.
June 24, "	Decree of the court below affirmed and appeal dismissed at cost of appellant. (The Chief Justice and Justice Kephart dissent).
8	Per Simpson, J.
June 24, 1922.	Dissenting opinion filed by Moschzisker, C. J.
" " "	" " " " " Kephart, J.
Jul. 12, "	Petition for writ of error order filed at Philadelphia.

After consideration of the foregoing petition for writ of error, it is hereby ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered herein, be, and the same is hereby allowed, and that a certified transcript of the record, proceedings and papers in this cause be forthwith transmitted to the Supreme Court of the United States. It is further ordered that the bond on appeal be fixed at the sum of \$10,000. Dated July 12, 1922.

ROBT. VON MOSCHZISKER,
*Chief Justice of the Supreme
Court of Pennsylvania.*

- Jul. 12, 1922. Assignment of errors filed at Philadelphia.
 " " " Writ of error from Supreme Court of the United States filed at Philadelphia.
 Jul. 12, 1922. Citation from Hon. Robt. Von Moschzisker, Chief Justice of the Supreme Court of Pennsylvania filed at Philadelphia.

And now, to wit, July 17, 1922, service of the within citation is accepted on behalf of the Defendants in Error named therein.

GEO. ROSS HULL,
*First Deputy Attorney General of the
Commonwealth of Pennsylvania.*

- Jul. 22, 1922. Bond on writ of error in the sum of \$10,000 approved by Hon. Robt. Von Moschzisker, Chief Justice of Pennsylvania, filed.

Equity Docket Entries.

Among the records and proceedings enrolled in the Court of Common Pleas in and for the County of Dauphin in the Commonwealth of Pennsylvania, to No. 709, Equity Docket, is contained the following:

Copy of Equity Docket Entry.

In Equity.

Nov. 9, 1921.

709.

ROLAND C. HEISLER

VS.

THOMAS COLLIERY COMPANY, E. HERBERT SUENDER, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania.

Reese H. Harris.
Henry S. Drinker, Jr.
William S. Jenney.
Frank W. Wheaton.
Hull, Collins, Gawthrop, Alter.

Nov. 9, 1921.—Bill filed.

Nov. 9, 1921.—Service of Bill of Complaint accepted by Geo. R. Hull for defendants.

Nov. 9, 1921.—Geo. Ross Hull, Emerson Collins, Robt. S. Gawthrop and Geo. E. Alter, appear for defendants; See file.

Nov. 9, 1921.—Answer filed.

Feb. 2, 1922.—Plaintiff's request for findings of fact and answers thereto filed.

10 Feb. 2, 1922.—Defendants' exceptions to Plaintiff's requests for findings of fact filed.

Feb. 2, 1922.—Plaintiff's requests for conclusions of law and answers thereto filed.

Feb. 2, 1922.—Exceptions to plaintiff's requests for conclusions of law filed.

Feb. 2, 1922.—Defendants' requests for findings of fact and answer thereto filed.

Feb. 2, 1922.—Defendants' requests for conclusions of law and answers thereto filed.

Feb. 2, 1922.—Plaintiff's exceptions to defendants' requests for findings of fact and conclusions of law filed.

Feb. 2, 1922.—Opinion of the Court filed same day, the following decree nisi is entered, "And now, Feb. 1, 1922, this cause came on to be heard on Bill and answer. It appearing to the Court that the Act of May 11, 1921, P. L. 479 entitled 'An Act imposing a State Tax on Anthracite Coal, Providing for the Assessment and collection thereof,

and providing penalties for the violation of this Act' is not in violation or contravention of either the Constitution of the United States or the Constitution of Penna. in any of the particulars charged in the Bill of Complaint, it is hereby ordered, adjudged and decreed that the said Bill of Complaint be dismissed at the cost of the Plaintiff."

Feb. 13, 1922.—Plaintiff's exceptions to findings of fact in law and to decree filed.

Feb. 14, 1922.—Defendants' exceptions to findings of fact made by the Court filed.

Feb. 15, 1922.—This cause having come on to be heard before the court in Banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the court to the plaintiff's twentieth request for Findings of Fact is modified so as to read as follows: "We find that if the Act of May 11, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused."

11 In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff.

And now February 15, 1922, an exception to this decree is allowed to the plaintiff and a bill is sealed. See decree filed.

February 20, 1922, certiorari sur appeal, No. 15 May Term 1922 from the Supreme Court received and filed.

February 28, 1922, approved bond on appeal filed.

April 10, 1922. Certified.

ABRAM L. ETTER,
Prothonotary.

12

Bill of Complaint.

In the Court of Common Pleas for the County of Dauphin.

In Equity.

Between

ROLAND C. HEISLER, Plaintiff,

and

THOMAS COLLIERY COMPANY, E. HERBERT SUENDER, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants.

13 To the Honorable the Judges of said Court:

The plaintiff complains and says:

1. That he is a citizen of Pennsylvania, residing in Philadelphia, and is the owner and registered holder of twenty shares of the capital stock of Thomas Colliery Company, one of the above-named defendants, of the par value of \$100.00 each; that the capital stock of said Company is divided among a number of different persons; that this Bill of Complaint is filed for an object common to all of said stockholders, and that he therefore brings suit not only in his own behalf as a stockholder of said corporation, but also as a representative of and on behalf of such of the other stockholders similarly situated and interested who may join herein.

2. The defendant Thomas Colliery Company is a corporation duly organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, with power to own and operate coal mines, and owns and operates an anthracite colliery and coal mines at Shenendoah, Pennsylvania, and washeries for the recovery and preparation of coal and culm from culm banks at Lost Creek, Pennsylvania. Defendants, John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, and Harlow Voorhees are the duly elected and qualified directors of Thomas Colliery Company. Defendant, E. Herbert Suender, is the superintendent in charge of the anthracite coal mines of said Thomas Colliery Company. Defendant, Samuel S. Lewis, is the duly elected and qualified Auditor General of the Commonwealth of Pennsylvania. Defendant, Charles A. Snyder, is the duly elected and qualified State Treasurer of the Commonwealth of Pennsylvania.

3. By the Act of General Assembly No. 225, approved May 11th, 1921, entitled "An Act imposing a State Tax on anthracite coal providing for the assessment and collection thereof and providing penalties for the violation of this act," which said act became effective July 1st, 1921, the Legislature of Pennsylvania provided that each and every ton of anthracite coal prepared for market in this Commonwealth shall be subject to a tax of one and one-half per centum of the value thereof.

4. Under its charter and by-laws and by the laws of the Commonwealth of Pennsylvania, the management of the stock, property, affairs and concerns of the Thomas Colliery Company is entrusted to and conferred upon the directors thereof as a board, acting by the vote of a majority of the directors at a meeting thereof. The plaintiff avers that a majority of the directors of the said Company claim and assert that under the provisions of the said Act of Assembly approved May 11th, 1921, the Company is liable for, and they intend to pay without protest to the Commonwealth of Pennsylvania, a tax of one and one-half per centum of the value of each and every ton of anthracite coal prepared for market by the said Company in Pennsylvania. The by-laws of said Company provide no method by which complainant can, by action within the corporation, prevent or restrain defendants from taking the above action.

5. The defendant, E. Herbert Suender, claims and asserts that under the provisions of said Act of Assembly approved May 11th, 1921, he is directed and required to ascertain and assess daily the number of gross tons of anthracite coal mined, washed or screened and to fix the value thereof, and for this reason said E. Herbert Suender is, and has been since July 1st, 1921, assessing daily the number of gross tons of anthracite coal mined, washed and screened in the mines, collieries and washeries of said Company and fixing the value thereof and proposes to continue said daily assessment. And the said E. Herbert Suender further proposes to file with the Auditor General of Pennsylvania on or before January 15th, 1922, or February 1st, 1922, a report stating specifically the number of gross tons mined, washed or screened between July 1st, 1921, and December 31st, 1921, and the value thereof as assessed by him and the amount of tax assessed thereon under the provisions of said Act of Assembly approved May 11th, 1921. The plaintiff avers that the making of said daily assessments is an essential step in the proceedings to enforce the collection of and commits said Company to the payment of said unlawful tax, to the injury of plaintiff and the other stockholders.

6. The plaintiff avers that he is informed and believes that the defendants Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, the State Treasurer of the Commonwealth of Pennsylvania, propose and intend to comply with the provisions of said Act of Assembly approved May 11th, 1921, and to enforce and collect a tax on anthracite coal as prescribed in said act.

7. The plaintiff has requested E. Herbert Suender to omit and refuse to make said daily assessments and to refuse to make the said reports to the Auditor General, and has requested the Thomas Colliery Company and its directors to compel E. Herbert Suender defendant to cease making said daily assessments and to refuse to pay the same and to omit and refuse to pay the said tax on anthracite coal and to contest the constitutionality of said Act of Assembly approved May 11th, 1921, and to apply to a Court of competent jurisdiction to determine its liability under said Act, but the said E. Herbert Suender and the said Thomas Colliery Company and its directors have refused and continue to refuse to comply with plaintiff's request and declare their intention to comply with the provisions of said Act of Assembly without protest.

8. The commodity known as coal is a fuel and is found in various grades or qualities in Pennsylvania, the grades being known as anthracite, bituminous, semi-anthracite and semi-bituminous.

16 9. The difference between anthracite, semi-anthracite, bituminous and semi-bituminous coal is one of degree and not of kind; it is a matter of difference in fixed carbon, volatile matter and dullness and brightness in appearance. They belong to one general class, are closely related both as to origin and use. There is as much difference between certain grades of anthracite as between some grades of anthracite and some grades of coal not called anthracite. All grades of coal, both anthracite and bituminous, are used for fuel purposes.

10. Anthracite coal is found only in nine counties out of sixty-seven counties in the State of Pennsylvania, viz: Wayne, Susquehanna, Lackawanna, Luzerne, Columbia, Carbon, Schuylkill, Northumberland and Dauphin.

11. Bituminous coal is found in twenty-four counties of Pennsylvania, viz: The Counties of Allegheny, Armstrong, Beaver, Blair, Bedford, Cambria, Cameron, Centre, Clarion, Clearfield, Clinton, Elk, Fayette, Greene, Huntingdon, Indiana, Jefferson, Lawrence, Lycoming, Mercer, Somerset, Washington and Westmoreland. Semi-anthracite is found in Sullivan County.

12. The production of anthracite in the year 1920 was 78,842,000 gross tons; semi-anthracite in Pennsylvania, 479,953 gross tons; bituminous and semi-bituminous in the entire United States, 496,930,000 gross tons, of which 145,000,000 gross tons were produced in Pennsylvania.

13. The total production of anthracite coal is sold in competition with bituminous coal in the general fuel market and approximately thirty per centum is prepared, shipped and used in what are known as steam sizes (sizes smaller than pea), and these steam sizes are sold in direct competition with bituminous, semi-bituminous and semi-anthracite grades of coal in the fuel markets both in Pennsylvania and outside of Pennsylvania. Approximately 10 per cent. is pea coal which also competes directly with bituminous.

17 14. Coal in place is assessed at its full value as land and all local taxes levied thereon, to wit, county taxes, township taxes, city taxes, school taxes, road taxes, borough taxes and poor taxes and the Thomas Colliery Company and other local mining corporations pay taxes to the Commonwealth upon capital stock, in which the value of coal lands is considered, in fixing its value.

15. Of all the said grades of coal found in Pennsylvania a very large proportion is exported to other States and Territories of the United States and to foreign countries. Approximately 80 per centum of the total production of anthracite coal is shipped, sold and used as fuel outside of the Commonwealth of Pennsylvania.

16. Of the anthracite coal prepared for market by the Thomas Colliery Company, approximately 67 per centum is sold and shipped outside of the Commonwealth of Pennsylvania, and a considerable proportion is sold and shipped to foreign countries.

17. In the case of Commonwealth vs. Alden Coal Company, 251 Pa. 134, the Supreme Court of Pennsylvania held to be unconstitutional the Act of Assembly approved June 27th, 1913, Pamphlet Laws, page 639, entitled "An Act levying a tax on anthracite coal and providing for the collection and distribution of the same." The Act of Assembly approved May 11th, 1921, is unconstitutional and void under this decision of the Supreme Court of Pennsylvania.

18. Between October 2d, 1915, the date of the said decision in Commonwealth vs. Alden Coal Company 251 Pa. 134, and May 11th, 1921, the Thomas Colliery Company expended upwards of \$100,000 in constructing and adding permanent improvements to washeries and the facilities immediately connected therewith designed for the recovery and preparation from culm banks of the coal therein of

18 which by far the greater part consists of steam sizes and pea coal which are sold in direct competition with bituminous, semi-bituminous and semi-anthracite grades of coal in the fuel markets both in Pennsylvania and outside of Pennsylvania; and said Thomas Colliery Company, during said period expended upwards of \$125,000 in constructing and adding permanent improvements to its coal mines and collieries for the production and preparation for market of fresh mined coal, approximately 40 per centum of which consists of said pea and smaller sizes.

19. In said period the corporations and other owners, operators and lessees of anthracite coal mines in Pennsylvania have expended upwards of \$30,000,000 in constructing and adding permanent improvements to collieries, washeries, screening plants and other buildings and structures for the purpose of producing and preparing for market said anthracite coal, a large part of which expenditure was in connection with the construction and improvement of washeries and the facilities connected therewith designed for the recovery and preparation for market of the pea and smaller sizes of coal contained in the culm banks appurtenant to such washeries.

20. The Act of May 11, 1921, is unconstitutional and void in that it offends against the First Section of Article IX of the Constitution of Pennsylvania, which provides as follows:

"All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

21. The Act of May 11, 1921, is unconstitutional and void in that it offends against the Eighth Section of Article III of the Constitution of Pennsylvania, which provides:

"No local or special bill shall be passed unless notice of the intention to apply therefor shall have been published in the locality where the matter or the thing to be affected may be situated; which notice shall be at least 20 days prior to the introduction into the General Assembly of such bill and in the manner to be provided by law; the evidence of such notice having been published shall be exhibited in the General Assembly before such act shall be passed."

No notice was ever published of the proposed introduction and enactment of the Act of May 11, 1921, a local and special bill, in any of the counties or localities in which anthracite coal is found.

22. The Act of May 11, 1921, is void in that it is a local or special bill and notice of the intention to apply therefor was not published as required by the provisions of the act entitled "An act regulating the publishing of application for local or special legislation," approved February 12th 1874 (P. L. 43).

23. The Act of May 11th, 1921, is void in that its provisions are indefinite and unenforceable for the reason that it is impossible to determine from the act the exact date on or before which to file the annual report required by the provisions of the act to be filed with the Auditor General, and for the further reason that it is impossible to determine from the act when the penalties imposed thereby for neglect or failure to make said report are incurred, and for other reasons said act is indefinite and unenforceable and therefore void.

24. The Act of May 11th, 1921, is unconstitutional and void because it is in contravention of Clause 5 of Section 9 of Article I of the Constitution of the United States which provides that:

"No tax or duties shall be laid on articles exported from the State."

20 This constitutional provision is violated for the reason that the larger part of anthracite coal is exported from the state.

25. The Act of May 11th, 1921, is unconstitutional and void for the reason that it is in violation of Clause 3 of Section 8 of Article I of the Constitution of the United States, which provides that:

"Congress shall have the power to regulate commerce with foreign nations and among the several states and with the Indian Territories."

This provision of the Constitution of the United States is violated for the reason that the larger part of the production of anthracite coal is used in interstate commerce among the several states and foreign nations, and it is beyond the power of the Legislature of Pennsylvania to interfere with such interstate commerce by imposing an arbitrary, unjust and unreasonable tonnage tax on an article of interstate commerce.

26. The Act of May 11th, 1921, is unconstitutional and void for the reason that it is in contravention of that portion of the Fourteenth Amendment of the Constitution of the United States, which reads as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

The deposits of anthracite coal in Pennsylvania are to be enjoyed by the citizens of all the states.

27. If the said E. Herbert Suender continues to assess daily said tax and makes the report required by said act and if the said Company and its directors, as they propose and declare their intention to do, pay without contest the tax imposed by said Act of Assembly approved May 11th, 1921, they will materially and permanently misappropriate and diminish the assets of the Company and will consequently lessen the dividends on the shares of stock and the value of the shares, and thus diminish the equity of the stockholders in said corporation; the interest of the plaintiff as a stockholder will be greatly and irreparably injured thereby, and there will be no means of redress available to him.

28. The plaintiff further avers that the determination in this suit of the question of the constitutionality of the Act of Assembly approved May 11th, 1921, will prevent a multiplicity of suits by the stockholders of the Thomas Colliery Company, which suits would work irreparable injury to the business of said Company, to the irreparable damage of plaintiff and its other stockholders.

Plaintiff is without adequate remedy at law and has need of equitable relief and he therefore prays:

1. That it may be adjudged and decreed that the said Act of Assembly approved May 11th, 1921, is unconstitutional and void.

2. That the defendant E. Herbert Suender, may be perpetually restrained from complying with the provisions of said act and making or causing to be made a daily assessment of the number of gross tons of coal mined, washed and screened, and from fixing the value

hereof, and from making or causing to be made the report in writing under oath to the Auditor General on or before January 15th, 1922, or February 1st, 1922, and annually thereafter as prescribed in said Act of Assembly.

3. That the said Thomas Colliery Company and John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill and Harlow Voorhees, directors of said Company, be perpetually restrained from complying with the provisions of said Act of Assembly approved May 11th, 1921, and from paying the tax on anthracite coal imposed by said act.

4. That the said Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and the said Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, be perpetually restrained from carrying out or attempting to carry out any of the provisions of said act and from assessing and collecting the tax on anthracite coal imposed by the said act.

5. That the defendants Samuel S. Lewis, Auditor General of Pennsylvania, and Charles A. Snyder, State Treasurer of Pennsylvania, Accounting Officers of the Commonwealth of Pennsylvania, may be enjoined and restrained by preliminary injunctions, to be made perpetual in final hearing, from demanding from the plaintiff Company the submission of any reports under the provisions of the said act, from demanding from the plaintiff Company payment of any sums of money or bringing any suit or suits against it for the recovery of any penalty imposed by the said act in case the Plaintiff Company shall not comply with the requirements thereof on or after the 15th day of January or the 1st day of February, 1922, either as to the matter of making reports to the Auditor General or the payment of taxes that may be settled as against the plaintiff Company under the provisions of said act.

6. That the plaintiff may have such other and further relief as the Court may decree proper and equitable and the necessities of the case require.

REESE H. HARRIS,
HENRY S. DRINKER, JR.,
WILLIAM S. JENNEY,
FRANK W. WHEATON,
Solicitors for Complainant.

23 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Before me, the undersigned, a Notary Public in and for the said State and County, personally appeared Roland C. Heisler, the above-named complainant, who, being duly sworn, deposes and says that the facts set forth in the foregoing complaint are true to the best of his knowledge, information and belief.

ROLAND C. HEISLER.

Sworn to and subscribed before me this 2nd day of November 1921.

[Notarial Seal.]

WM. M. KITZMILLER,
Notary Public.

Notary Public.

My commission expires January 8, 1925.

- 24 To Thomas Colliery Company, E. Herbert Suender, Superintendent of Thomas Colliery Company; John Gilbert Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants:

You are hereby notified and required within fifteen days after service hereof on you to cause an appearance to be entered for you in the Court of Common Pleas of Dauphin County to the within Bill of Complaint of the within named Roland C. Heisler and to observe what the said Court shall direct. You are also notified that if you fail to comply with the above directions by not entering an appearance in the Prothonotary's Office within fifteen days, you will be liable to have the bill taken pro confesso, and a decree made against you in your absence.

Witness our hands at Philadelphia, Pa. this seventh day of November, A. D. 1921.

REESE H. HARRIS,
HENRY S. DRINKER, Jr.,
WILLIAM J. JENNEY,
FRANK W. WHEATON,
Solicitors for the Complainant.

And now Nov. 9, 1921, ~~1921~~, service of the foregoing notice and of a copy of the within Bill of Complaint is accepted on behalf of all of the defendants therein named.

GEO. ROSS HULL,
Deputy Attorney General.

- 25 (Endorsement:) No. 709. Equity Dk. 1921. In the Court of Common Pleas of Dauphin County, Pennsylvania, Sitting in Equity. Between Roland C. Heisler, Plaintiff, and Thomas Colliery Company, E. Herbert Suender, Superintendent of Thomas Colliery Company, John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company, Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants. Bill of Complaint. Filed Nov. 9, 1921. Reese H. Harris, Henry S. Drinker, Jr., William S. Jenney, Frank W. Wheaton, Solicitors for Complainant.

26

Appearance for the Defendants.

In the Court of Common Pleas of Dauphin County, Sitting in Equity.

No. —, Equity Docket.

Between

ROLAND C. HEISLER, Plaintiff,

and

THOMAS COLLIERY COMPANY, E. HERBERT SUENDER, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants.

Appearance for the Defendants.

To the Prothonotary of the Court of Common Pleas of Dauphin County:

Enter our appearance for Thomas Colliery Company; E. Herbert Suender, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania; and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants.

Harrisburg, Pennsylvania, November 9, 1921.

GEO. ROSS HULL,
EMERSON COLLINS,

Deputy Attorneys General.

ROBERT S. GAWTHROP,
First Deputy Attorney General.

GEO. E. ALTER,
Attorney General.

27

(Endorsement:) In the Court of Common Pleas of Dauphin County, Sitting in Equity. No. 709, Equity Docket. Between Roland C. Heisler, Plaintiff, and Thomas Colliery Company, E. Herbert Suender, Superintendent of Thomas Colliery Company, John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company, Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants. Appearance for

the Defendants. Filed Nov. 9, 1921. Geo. Ross Hull, Emerson Collins, Deputy Attorney General. Robert S. Gawthrop, First Deputy Attorney General. Geo. E. Alter, Attorney General.

28

Answer.

In the Court of Common Pleas of Dauphin County, Pennsylvania.
Sitting in Equity.

No. 192.

Between

ROLAND C. HEISLER, Plaintiff,

and

THOMAS COLLIERY COMPANY, E. HERBERT SUENDER, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants.

Answer.

To the Honorable the Judges of said Court:

The defendants now and at all times saving and reserving to ourselves all manner of benefit and advantage of exception to the many errors and insufficiencies in said Bill contained, for answer thereto or to so much or such parts thereof as we are advised it is material for us to make answer unto, say:

First. The averments of the first paragraph are admitted.

Second. The averments of the second paragraph are admitted.

Third. The averments of the third paragraph are admitted.

Fourth. The averments of the fourth paragraph are admitted.

29 Fifth. The averments of the fifth paragraph are admitted, but it is denied that said tax is unlawful.

Sixth. The averments of the sixth paragraph are admitted.

Seventh. The averments of the seventh paragraph are admitted.

Eighth. We do not admit the conclusion averred in the Bill, that anthracite and bituminous coal are merely different grades or qualities of coal, but submit to the Court that they are distinctly different commodities under the basic facts hereinafter averred. The coal sometimes known as semi-bituminous is a grade of bituminous coal

higher in its percentage of fixed carbon and lower in its percentage of volatile matter than is ordinarily the case in bituminous coal, and the coal sometimes known as semi-anthracite is a low grade of anthracite coal containing some volatile matter and a lower percentage of fixed carbon than is ordinarily the case with anthracite coal. The quantities of said coals referred to as semi-anthracite or semi-bituminous produced in Pennsylvania are very small as compared with the total of anthracite and the total of bituminous, respectively, as produced in the State, it appearing by the plaintiff's Bill that the total quantity of anthracite is about one hundred and sixty-three times the quantity of semi-anthracite.

Ninth. We do not admit the conclusion averred in the ninth paragraph that the difference therein referred to is one of degree and not of kind, but submit said conclusion to the Court under the basic facts as herein averred. The physical differences which distinguish anthracite and bituminous coal are differences in fixed carbon, volatile matter, color and dullness and brightness in appearance, and also in their structural character, anthracite being compact and hard and comparatively clean and free from dust and commonly termed
30 "hard coal," while bituminous coal is very much less hard, is dusty and dirty and is commonly termed "soft coal." They are also distinguished by the fact that as the fuel ratio (ascertained by dividing the percentage of fixed carbon by the percentage of volatile matter) of bituminous rises the coal is more soft, and as the fuel ratio of anthracite rises the coal is harder.

As to the averment that they belong to one general class and are closely related as to origin and use, we submit that the question of whether two subjects belong to one class depends upon the extent of the classifications adopted, and, so far as relates to this case, it is a question for the Court under the basic facts as herein averred. They are related in their origin, in that both anthracite and bituminous were produced from vegetable matter by processes of nature, and they are related in their use in that both are used for fuel purposes. Substantially all the anthracite is used for fuel only, while bituminous and its products are used for a great number of other purposes, as appears by the averments hereinafter contained.

It is true that as to their chemical composition there is as much difference between certain grades of anthracite as between some grades of anthracite and some grades of coal not called anthracite, which latter grades, however, are small in quantity as produced in Pennsylvania. Except as to structure, the general difference between bituminous and anthracite is the same as that between bituminous and coke.

The differences between anthracite and bituminous coal, which we aver, have reference to their origin, places of deposit, composition, production, use, value and commercial recognition. Among these are the following:

(1) Wherever one is present in Pennsylvania the other is absent. No county produces both.

(2) Both were originally deposits of vegetable matter, and have been brought to their present forms by the processes of nature. According to the commonly accepted theory anthracite, however, has been subjected to a process which has not been applied to
31 bituminous, whereby, through the application of heat, a large proportion of the volatile matter has been removed, as it is removed from bituminous coal in the manufacture of coke.

(3) The difference between anthracite, a product of nature, and coke, which is produced from bituminous coal by a process of manufacture, consists in the structure, that of coke being cellular, while the pressure to which anthracite has been subjected has rendered it a hard, compact substance.

(4) Bituminous coal burns with more or less smoke—most of it with a dense smoke—by reason of which some municipalities impose regulations requiring special appliances to abate the “smoke nuisance,” while anthracite burns with a practically smokeless flame.

(5) As hereinbefore averred, substantially all anthracite coal is used for fuel, which use is in the production of heat for domestic purposes and in the production of steam both for domestic purposes and for power. About sixty-one per cent of that produced in Pennsylvania is used for domestic purposes. A small percentage of the anthracite produced in Pennsylvania is used in the production of gases, known as water-gas and producer-gas. Said gases, which are also produced from coke, are of a different character from that produced from bituminous coal. The gas produced from bituminous coal, known as coal gas, is produced from the volatile matter in said coal, while the said gases produced from anthracite are obtained by mixing the carbon of the coal combined with oxygen, in the form of CO , with nitrogen from the air, to obtain producer-gas, or with hydrogen from superheated water vapor, to obtain water-gas.

Bituminous coal is divided into two types—caking and non-caking or splint coal, that is, coals that will intumescence or run together in burning and those which do not run together but remain separate like blocks of wood. Practically all (at least ninety-nine per cent) of the bituminous coal produced in Pennsylvania is of the caking type. This caking property is the foundation of the coking industry. While practically all of the bituminous coal of Penn-
32 sylvania is caking coal as aforesaid, not all of it will make commercially acceptable coke because of the percentage of phosphorus or sulphur. Methods of eliminating these impurities are being developed, whereby the percentage of the Pennsylvania bituminous coal available for the manufacture of marketable coke is increasing. Recent experiments in by-product ovens indicate that practically all the bituminous coal in Pennsylvania will be available for the manufacture of marketable coke when the elimination of high sulphur and high phosphorus has been accomplished.

In the year 1918 more than one-quarter of the bituminous coal produced in Pennsylvania was used in the manufacture of coke.

Later statistics are not available. Of the coal so used, approximately seventy-two per cent was manufactured into coke by the "beehive oven process" and approximately twenty-eight per cent by the "by-product process." The said beehive process is the old-fashioned process and is being rapidly replaced by the by-product process. The said by-product process is usually operated near the place of consumption of the coke, with coal produced from more than one source, and about one-half the coal produced in Pennsylvania and used in said process in 1918 was so used at points outside the State. Each process eliminates from the coal a large percentage of the volatile matter for the purpose of producing the coke. In the beehive process the volatile matter so extracted is dissipated in the atmosphere and lost, while in the by-product process the gas liberated is saved and used for fuel and illumination and, with some resultant chemical changes and by distillation and condensation, volatile matter is recovered in the form of tar or pitch, ammonia (used largely in the manufacture of fertilizers) cyanide and benzol and other oils used to generate power by internal combustion and for other purposes. Much of the tar or pitch so recovered is used, among other purposes, in materials for the surfacing of highways, the State Highway Department of Pennsylvania using annually from 3,000,000 to 6,000,000 gallons of such tar or pitch for such purpose. From said tar or pitch

33 there are extracted by various processes certain products which, though it is possible to extract them from anthracite, cannot be produced therefrom in quantities rendering such production commercially practicable and none of which are in practice produced therefrom. Said products include—

- Saccharine, a substitute for sugar;
- Lampblack;
- Dyes;
- Sulphur compounds;
- Indigo;
- Carbolic acid and other antiseptics and germicides;
- Explosives, including picric acid, "T. N. T.," etc.;
- Flavoring materials;
- Hydroquinine, for photographic development;
- Paints;
- Cleansing compounds and paint removers;
- Chloride;
- Creosote;
- Perfumery;
- And hundreds of medicinal and other products in common use.

Coke cannot be made from anthracite coal.

For the year 1917, the latest figures available, approximately thirty-five per cent of the coal used in the said by-product process in the United States, and more than half of that used in the beehive process was produced in Pennsylvania. In the year 1918 the quantities produced and the prices of the quantities sold of certain of the by-products obtained in the said by-product process operations

in the United States were as follows: tar, 263,299,470 gallons, \$6,364,972; ammonia, 501,618,293 pounds, \$26,442,951; gas, 385,035,154,000 cubic feet, \$13,699,515; benzol products, 145,405,811 gallons, \$25,688,446; naphthaline, 16,087,498 pounds, \$650,229; other products, \$1,756,345; total, \$74,602,458.

In 1918 the total production of coke in the United States was about 56,000,000 tons of a value of about \$382,000,000 at the ovens, and of said total production about forty-seven per cent was produced in Pennsylvania.

34 A large amount of bituminous coal produced in Pennsylvania is used in the production of gas for fuel and illumination in addition to the gas produced in connection with the manufacture of coke as aforesaid.

(6) The railroads of Pennsylvania, in their commodities classification, place coal in two classes—bituminous and anthracite. Anthracite is sub-classified into at least three classes: (a) domestic sizes (larger than pea coal); (b) pea coal; (c) smaller than pea coal; all carrying different freight rates.

(7) The Congress of the United States, in levying import taxes, has placed bituminous and anthracite coal in separate classes in the following instances:

(a) The Act of March 2d, 1861 (12 Stat. L. 178, 182) placed a tax of \$1 per ton on bituminous coal and a tax of 50 cents per ton on all other coal.

(b) The Act of June 30th, 1864 (13 Stat. L. 202, 206), placed a tax of \$1.25 a ton on bituminous coal and shale and tax of 40 cents per ton on all other coal.

(c) The Act of July 14th, 1870 (16 Stat. L. 256, 266), passed to remove certain commodities from the taxable list to the free list, enumerates anthracite coal as one of said commodities.

(d) In the Act of March 3d, 1883 (22 Stat. L. 488, 511), a tax of 75 cents per ton is laid on bituminous coal and anthracite is named on the free list.

(e) In the Act of October 1, 1890 (26 Stat. L. 567, 600), a tax of 75 cents per ton is laid on bituminous coal and anthracite coal is named on the free list.

(f) In the Act of August 27th, 1894 (28 Stat. L. 509, 533), a tax of 40 cents per ton is laid on bituminous coal and anthracite coal is named on the free list.

(g) In the Act of July 24th, 1897 (30 Stat. L. 151, 190), a tax of 67 cents per ton is laid on bituminous coal and all coal containing less than 92 per cent. of fixed carbon and anthracite coal, not specially provided for in the Act, is named on the free list.

35 (h) In the Act of August 5th, 1909 (36 Stat. L. Part one, 11, 65), a tax of 45 cents per ton is laid on bituminous coal and anthracite coal is named on the free list.

The present Tariff Act of 1913 places all coal on the free list.

(8) The Canadian Parliament, in levying import taxes, has placed bituminous and anthracite coal in separate classes in the following instances:

(a) In Vol. I of the Revised Statutes of Canada, 1886, Chapter 33, page 373, a tax of 50 cents per ton of 2,000 pounds was placed on anthracite coal and a tax of 60 cents per ton of 2,000 pounds was placed on bituminous coal.

(b) By the Act of June 23d, 1887, page 130 (Chapter 39), anthracite coal was placed on the free list, the duty on bituminous coal being retained.

(c) By the Act of July 23d, 1894, a tax of 60 cents per ton of 2,000 pounds was placed on bituminous coal and anthracite coal was placed on the free list.

(d) By the Act of June 29th, 1897, pages 85 and 101, rates of taxation, dependent upon the sizes, were placed upon bituminous coal and anthracite coal was placed on the free list.

(9) By Act approved May 18th, 1878, P. L. 67, the standard weight of bituminous coal in this Commonwealth is fixed at seventy-six pounds to the bushel and 2,000 pounds to the ton, penalties being imposed upon persons engaged in the mining of bituminous coal who shall fix any other standard. By Act approved June 26th, 1895, P. L. 334, the weight of 2,240 pounds avoirdupois is made to constitute the legal ton of anthracite coal in the Commonwealth in all transactions between retail coal dealers and their customers.

(10) The price of anthracite on cars at the mine is ordinarily much larger than the price of bituminous on cars at the mine, the difference resulting largely from differences in rates of royalty and cost of production and preparation for market.

(11) The State of Pennsylvania has enacted two separate and distinct laws regulating the mining of coal, to wit: the Act of June 2d, 1891, P. L. 176, and its supplements regulating only mining and preparation of anthracite, and the Act of June 9th, 1911, P. L. 756, and its supplements applying only to the mining of bituminous coal.

Tenth. The averments of the tenth paragraph are admitted.

Eleventh. The averments of the eleventh paragraph are admitted.

Twelfth. The averments of the twelfth paragraph are admitted. All of the anthracite coal therein referred to was produced in Pennsylvania.

Thirteenth. The averments of the thirteenth paragraph are admitted.

Fourteenth. The averments of the fourteenth paragraph are admitted.

Fifteenth. The averments of the fifteenth paragraph are admitted.

Sixteenth. The averments of the sixteenth paragraph are admitted.

Seventeenth. The averments of the first sentence of the seventeenth paragraph are admitted. The second sentence states a legal conclusion which is denied.

Eighteenth. The averments of the eighteenth paragraph are admitted, but their relevancy denied.

37 Nineteenth. The averments of the nineteenth paragraph are admitted, but their relevancy denied.

Twentieth. The twentieth paragraph states a legal conclusion which is denied.

Twenty-first. We deny the legal conclusions stated in the twenty-first paragraph. As to the averment that no notice of the proposed introduction and enactment of the Act of May 11th, 1921, was published, we submit that if notice by publication was required it is presumed to have been given.

Twenty-second. We deny the legal conclusions stated in the twenty-second paragraph. As to the averment that notice was not given by publication we submit that if such notice — required it is presumed to have been given.

Twenty-third. The twenty-third paragraph states a legal conclusion which is denied.

Twenty-fourth. The twenty-fourth paragraph states a legal conclusion which is denied.

Twenty-fifth. The twenty-fifth paragraph states a legal conclusion which is denied.

Twenty-sixth. The twenty-sixth paragraph states a legal conclusion which is denied. Said tax in no way interferes with the equality of the opportunity of all citizens of the United States to enjoy the deposits of anthracite coal in Pennsylvania.

Twenty-seventh. We admit that if the plaintiff is entitled to redress he has no means of securing it except through the
38 intervention of the Court, but we submit that he will be subjected to no injury by the imposition of a lawful tax even if his dividends or the value of his interest in said corporation may be diminished thereby.

Twenty-eighth. The averments of the twenty-eighth paragraph are admitted.

And having fully answered said Bill we pray to be hence dismissed with our reasonable costs.

THOMAS COLLIERY COMPANY,
E. HERBERT SUENDER,
JOHN GILBERT,
JESSE W. POWELL,
LAURANCE BUTLER,
HORATIO H. MORRIS,
ROBERT C. HILL,
HARLOW VOORHEES,
SAMUEL S. LEWIS,

Auditor General,

CHARLES A. SNYDER,
State Treasurer,

By GEORGE E. ALTER,
*Attorney General of Pennsylvania,
Solicitors for Defendants.*

GEORGE ROSS HULL,
EMERSON COLLINS,
Deputy Attorneys General;
ROBERT S. GAWTHROP,
First Deputy Attorney General;
GEORGE E. ALTER,
*Attorney General,
Solicitors for Defendants.*

39 COMMONWEALTH OF PENNSYLVANIA,
County of York, ss:

Before me, the undersigned, a Notary Public in and for said State and County, personally came Samuel S. Lewis in behalf of himself and the other defendants, and being duly sworn deposes and says that the averments of fact in the foregoing answer are true to the best of his knowledge, information and belief.

SAMUEL S. LEWIS.

Sworn to and subscribed before me this 9th day of November, 1921.
[Notarial Seal.]

H. M. NESS,
Notary Public.

My Commission expires April 1, 1923.

40 (Endorsement:) No. 709, Eq. Dk. In the Court of Common Pleas of Dauphin County, Pennsylvania, Sitting in Equity. Between Roland C. Heisler, Plaintiff, and Thomas Colliery Company, E. Herbert Suender, Superintendent of Thomas Colliery Company, John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company, Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants. Answer. Filed Nov. 9, 1921. George Ross Hull, Emerson Collins, Deputy Attor-

neys General. Robert S. Gawthrop, First Deputy Attorney General.
George E. Alter, Attorney General, Solicitors for Defendants.

41 *Plaintiff's Requests for Findings of Fact.*

In the Court of Common Pleas of Dauphin County, Pennsylvania,
Sitting in Equity.

No. 709, Equity Docket, 1921.

Between

ROLAND C. HEISLER, Plaintiff,

and

THOMAS COLLIERY COMPANY, E. HERBERT SUENDER, Superintendent
of Thomas Colliery Company; John Gilbert, Jesse W. Powell,
Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow
Voorhees, Directors of Thomas Colliery Company, Samuel S. Lewis,
Auditor General of the Commonwealth of Pennsylvania, and
Charles A. Snyder, State Treasurer of the Commonwealth of
Pennsylvania, Defendants.

42 *Plaintiff's Requests for Findings of Fact.*

The learned trial Judge is respectfully requested to make the following findings of fact:

1. Plaintiff is a citizen of Pennsylvania, residing in Philadelphia, and is the owner and registered holder of twenty shares of the capital stock of Thomas Colliery Company, one of the above-named defendants, of the part value of \$100 each; the capital stock of said Company is divided among a number of different persons.

Affirmed.

2. Defendant Thomas Colliery Company is a corporation duly organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, with power to own and operate coal mines, and owns and operates an anthracite colliery and coal mine at Shenandoah, Pennsylvania, and washeries for the recovery
43 and preparation of coal and culm from culm banks at Lost Creek, Pennsylvania. Defendants, John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, and Harlow Voorhees, are the duly elected and qualified directors of Thomas Colliery Company. Defendant, E. Herbert Suender, is the superintendent in charge of the anthracite coal mines of said Thomas Colliery Company. Defendant, Samuel S. Lewis, is the duly elected and qualified Auditor General of the Commonwealth of Pennsylvania. Defendant, Charles A. Snyder, is the duly elected and qualified State Treasurer of the Commonwealth of Pennsylvania.

Affirmed.

3. By the Act of General Assembly No. 225, approved May 11th, 1921, entitled "An Act imposing a State Tax on anthracite coal, providing for the assessment and collection thereof and providing penalties for the violation of this act," which said act became effective July 1st, 1921. The Legislature of Pennsylvania provided that each and every ton of anthracite coal prepared for market in this Commonwealth shall be subject to a tax of one and one-half per centum of the value thereof.

Affirmed.

4. Under its charter and by-laws and by the laws of the Commonwealth of Pennsylvania, the management of the stock, property, affairs and concerns of the Thomas Colliery Company is entrusted to and conferred upon the directors thereof as a board, acting by the vote of a majority of the directors at a meeting thereof. A majority of the directors of the said Company claim and assert that under the provisions of the said Act of Assembly approved May 11th, 1921, the Company is liable for, and they intend to pay without protest to the Commonwealth of Pennsylvania, a tax of $1\frac{1}{2}$ per centum. of the value of each and every ton of anthracite coal prepared for market by the said Company in Pennsylvania. The by-laws of said Company provide no method by which complainant can, by action within the corporation, prevent or restrain defendants from taking the above action.

Affirmed.

5. The defendant, E. Herbert Suender, claims and asserts that under the provisions of said Act of Assembly approved May 11th, 1921, he is directed and required to ascertain and assess daily the number of gross tons of anthracite coal mined, washed or screened, and to fix the value thereof, and for this reason said E. Herbert Suender is, and has been since July 1st 1921, assessing daily the number of gross tons of anthracite coal mined, washed and screened in the mines, collieries and washeries of said Company and fixing the value thereof and proposes to continue said daily assessment. And the said E. Herbert Suender further proposes to file with the Auditor General of Pennsylvania on or before January 15th, 1922, or February 1st, 1922, a report stating specifically the number of gross tons mined, washed or screened between July 1st, 1921, and December 31st, 1921, and the value thereof as assessed by him and the amount of tax assessed thereon under the provisions of said Act of Assembly approved May 11th, 1921. The making of said daily assessments is an essential step in the proceedings to enforce the collection of and commits said Company to the payment of said unlawful tax, to the injury of plaintiff and the other stockholders.

We find the facts as stated herein. We do not find the tax to be unlawful.

6. The defendants, Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer

of the Commonwealth of Pennsylvania, propose and intend
45 to comply with the provisions of said Act of Assembly approved May 11th, 1921, and to enforce and collect a tax on anthracite coal as prescribed in said act.

Affirmed.

7. The plaintiff has requested E. Herbert Suender to omit and refuse to make said daily assessments and to refuse to make the said reports to the Auditor General, and has requested the Thomas Colliery Company and its directors to compel E. Herbert Suender defendant to cease making said daily assessments and to refuse to pay the same and to omit and refuse to pay the said tax on anthracite coal, and to contest the constitutionality of said Act of Assembly approved May 11th, 1921, and to apply to a Court of competent jurisdiction to determine its liability under said Act, but the said E. Herbert Suender and the said Thomas Colliery Company and its directors have refused and continue to refuse to comply with plaintiff's request and declare their intention to comply with the provisions of said Act of Assembly without protest.

Affirmed.

8. The commodity known as coal is a fuel and is found in various grades or qualities in Pennsylvania, the grades being known as anthracite, bituminous, semi-anthracite and semi-bituminous.

Refused, we find that anthracite and bituminous are different kinds of coal and that semi-anthracite is a grade of anthracite, and semi-bituminous is a grade of bituminous.

9. The difference between anthracite, semi-anthracite bituminous and semi-bituminous coal is one of degree and not of kind; it is a matter of difference in fixed carbon, volatile matter and dullness and brightness in appearance. They belong to one general class, are closely related both as to origin and use. There
46 is as much difference between certain grades of anthracite as between some grades of anthracite and some grades of coal not called anthracite. All grades of coal, both anthracite and bituminous, are used for fuel purposes.

Refused as stated.

10. Anthracite coal is found in only nine counties out of sixty-seven counties in the State of Pennsylvania, viz: Wayne, Susquehanna, Lackawanna, Luzerne, Columbia, Carbon, Schuylkill, Northumberland and Dauphin.

Affirmed.

11. Bituminous coal is found in twenty-four counties of Pennsylvania, viz: The Counties of Allegheny, Armstrong, Beaver, Blair, Bedford, Cambria, Cameron, Center, Clarion, Clearfield, Clinton, Elk, Fayette, Greene, Huntingdon, Indiana, Jefferson, Lawrence,

Lycoming, Mercer, Somerset, Washington and Westmoreland. Semi-anthracite is found in Sullivan County.

Affirmed.

12. The production of anthracite in the year 1920, was 78,842,000 gross tons; semi-anthracite in Pennsylvania, 479,953 gross tons; bituminous and semi-bituminous in the entire United States, 496,930,000 gross tons of which 145,000,000 gross tons were produced in Pennsylvania.

We so find with the addition that all the anthracite referred to was produced in Pennsylvania.

13. The total production of anthracite coal is sold in competition with bituminous coal in the general fuel market and approximately 30 per centum is prepared, shipped and used in what are known as steam sizes (sizes smaller than pea), and these steam sizes are sold in direct competition with bituminous, semi-bituminous and semi-anthracite grades of coal in the fuel markets both in Pennsylvania and outside of Pennsylvania. Approximately 10 per cent is pea coal which also competes directly with bituminous.

Affirmed.

14. Coal in place is assessed at its full value as land and all local taxes levied thereon, to wit, county taxes, township taxes, city taxes, school taxes, road taxes, borough taxes and poor taxes, and the Thomas Colliery Company and other coal mining corporations pay taxes to the Commonwealth upon capital stock, in which the value of coal lands is considered, in fixing its value.

Affirmed.

15. Of all the said grades of coal found in Pennsylvania a very large proportion is exported to other States and Territories of the United States and to foreign countries. Approximately 80 per centum of the total production of anthracite coal is shipped, sold and used as fuel outside of the Commonwealth of Pennsylvania.

Affirmed.

16. Of the anthracite coal prepared for market by the Thomas Colliery Company, approximately 67 per centum is sold and shipped outside of the Commonwealth of Pennsylvania, and a considerable proportion is sold and shipped to foreign countries.

Affirmed.

17. Between October 2d, 1915, the date of the decision in Commonwealth vs. Alden Coal Company, 251 Pa. 134, and May 11th, 1921, the Thomas Colliery Company expended upwards of \$100,000

in constructing and adding permanent improvements to washes and the facilities immediately connected therewith designed for recovery and preparation from culm banks of the coal therein which by far the greater part consists of steam sizes and pea coal which are sold in direct competition with bituminous, semi-bituminous and semi-anthracite grades of coal the fuel markets both of Pennsylvania and outside of Pennsylvania and said Thomas Colliery Company, during said period expended upwards of \$125,000 in constructing and adding permanent improvements to its coal mines and collieries for the production and preparation for market of fresh mined coal, approximately 40 per cent of which consists of said pea and smaller sizes.

Refused as immaterial.

18. In said period the corporations and other owners, operators and lessees of anthracite coal mines in Pennsylvania have expended upwards of \$30,000,000 in constructing and adding permanent improvement to collieries, washeries, screening plants and other buildings and structures for the purpose of producing and preparing for market said anthracite coal, a large part of which expenditure was in connection with the construction and improvement of washeries and the facilities connected therewith designed for the recovery and preparation for market of the pea and smaller sizes of coal contained in the culm banks appurtenant to such washeries.

Refused as immaterial.

19. No notice was in fact ever published of the proposed introduction and enactment of the Act of May 11th, 1921, in any of the counties or localities in which anthracite coal is found.

We find this fact because it is not specifically denied in the answer but we regard it as immaterial.

20. If the said E. Herbert Suender continues to assess daily stock tax and makes the report required by said act and if the said company and its directors, as they propose and declare their intention to do, pay without contest the tax imposed by said Act of Assembly approved May 11th, 1921, they will materially and permanently misappropriate and diminish the assets of the company and will consequently lessen the dividends on the shares of stock and the value of the shares, and thus diminish the equity of the stockholders in said corporation; the interest of the plaintiff as a stockholder will be greatly and irreparably injured thereby, and there will be no means of redress available to him.

Refused.

21. The determination in this suit of the question of the constitutionality of the Act of Assembly approved May 11th, 1921, will prevent a multiplicity of suits by the stockholders of the Thomas Colliery Company, which suits would work irreparable injury to the

business of said company, to the irreparable damage of plaintiff and its other stockholders.

Affirmed.

22. It is not alleged in the pleadings nor is it a fact that bituminous coal was not used for the manufacture of coke, gas and by-products prior to 1915.

Refused as immaterial.

23. The by-products obtained from bituminous coal are all obtainable from anthracite although not at present commercially produced therefrom.

Affirmed with the additional fact that such by-products cannot be produced from anthracite in quantities rendering such production commercially practical and none of which are produced therefrom.

24. Coke made from bituminous coal is chemically similar to anthracite coal although structurally different, coke being cellular by reason of its not having been subjected to the squeezing process which nature has applied to anthracite coal.

Affirmed.

50 25. Coke is used exclusively for fuel purposes.

Refused. It appears in the answer that water gas and producer gas are made from coke.

26. The gas extracted from bituminous coal in the coking process is used for fuel.

Refused as stated. The gas liberated in the by-product process is saved and used for fuel and illumination, but the unliberated gas enters into other by-products not used for fuel.

27. The different grades of anthracite coal vary materially in the amount of fixed carbon, and of volatile matter as well as in color, lustre and structural character, hardness, compactness, cleanness and freedom from dust, and such material variation exists between the different grades of anthracite coal and semi-anthracite and semi-bituminous.

We find that the different grades vary in the particulars stated but there is nothing in the pleadings which justifies a finding that they vary materially or that such material variation exists between the different grades of anthracite and semi-anthracite and semi-bituminous coal.

28. The fuel ratio of anthracite coal varies materially as between the different grades, and the fuel ratio of the different grades of anthracite coal differs materially from that of semi-anthracite and semi-bituminous coal.

We find that the fuel ration of anthracite coal varies, but we cannot find that such fuel ratio varies materially or that such ratio differs materially from that of semi-anthracite and semi-bituminous

REESE H. HARRIS,
HENRY S. DRINKER, Jr.,
WILLIAM S. JENNEY,
FRANK W. WHEATON,
Per H. S. DRINKER, Jr.,
Attorneys for Plaintiff.

51 (Endorsement:) No. 709, Equity Docket, 1921. In the Court of Common Pleas of Dauphin County, Pa., Sitting in Equity. Between Roland C. Heisler, Plaintiff, and Thomas Colliery Company, E. Herbert Suender, Superintendent of Thomas Colliery Company, John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company, Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants. Plaintiff's Requests for Findings of Fact. Filed Feb'y 2, 1922. Reese H. Harris, Henry S. Drinker, Jr., William S. Jenney, Frank M. Wheaton, Attorneys for Plaintiff.

52 *Defendants' Exceptions to Plaintiff's Requests for Findings of Fact.*

In the Court of Common Pleas of Dauphin County, Pennsylvania,
Sitting in Equity.

No. 709, Equity Docket, 1921.

Between

ROLAND C. HEISLER, Plaintiff,
and

THOMAS COLLIERY COMPANY; E. HERBERT SUENDER, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants.

53 *Defendants' Exceptions to Plaintiff's Requests for Findings of Fact and Conclusions of Law.*

To the Honorable the Judges of said Court:

The defendants except to the following of the plaintiff's requests for findings of fact:

1. The last sentence of request No. 5 is excepted to for the reason that it states legal conclusions and not matters of fact.

2. The eighth request is excepted to for the reason that it is an inference which is not supported by the underlying facts admitted in the pleadings. The facts set forth in paragraph eight of defendants' answer show that there are two separate and distinct kinds of coal produced in Pennsylvania, known as anthracite coal and bituminous coal, and that semi-anthracite coal is a grade of anthracite coal, and that semi-bituminous coal is a grade of bituminous coal.

3. The ninth request is excepted to for the reason that it is an inference which is not sustained by the underlying facts admitted in the pleadings.

4. The seventeenth request is excepted to for the reason that it contains facts immaterial, irrelevant and impertinent to the issue.

5. The eighteenth request is excepted to for the reason that it contains facts immaterial, irrelevant and impertinent to the issue.

6. The nineteenth request is excepted to for the reason that there is nothing in the bill and answer to support such a finding. It is not admitted by the defendants that no notice of the proposed introduction of the Act of May 11th, 1921, was published. In the absence of such an admission this fact cannot be found by the Court. (See authorities cited on page 36 of defendants' brief.)

7. The twentieth request is excepted to for the reason that it is based upon the legal conclusion that the Act of Assembly in question is unconstitutional and void. Unless this legal conclusion be accepted as a premise the plaintiff will be subjected to no injury by the imposition of the tax on anthracite coal, even though his dividends or the value of his interest in the defendant corporation may be diminished.

8. The twenty-second request is excepted to for the reason that it contains facts immaterial, irrelevant and impertinent to the issue.

9. The twenty-third request is excepted to for the reason that it is not sustained by the facts admitted in the pleadings. The admitted fact stated on page seven of defendants' answer is that although it is possible to extract certain by-products from anthracite coal, they cannot be produced therefrom in quantities rendering such production commercially practicable.

10. The twenty-fourth request is excepted to for the reason that it states a fact in direct contradiction to the facts admitted by the pleadings. It states that "coke made from anthracite coal is chemically similar to anthracite coal, etc." It is admitted (page eight of defendants' answer) that "coke cannot be made from anthracite coal." The use of the word "anthracite" in the first line of the twenty-fourth request was probably inadvertent. If this word be changed

to "bituminous" defendants' exception to this request may be considered withdrawn.

11. The twenty-fifth request is excepted to for the reason that it is not sustained by the facts admitted in the pleadings. It is stated on page five of defendants' answer that water-gas and producer-gas are produced from coke.

12. The twenty-sixth request is excepted to for the reason that it is not sustained by the facts admitted in the pleadings. It is admitted by the undisputed averment found on page seven of defendants' answer that by a process of distillation and condensation all of the numerous by-products of bituminous coal are produced from the gas extracted from bituminous coal. Inasmuch as the great majority of these by-products are not used for fuel and cannot be so used, the fact stated in this request is not correct.

13. The twenty-sixth request is excepted to for the further reason that gas produced from bituminous coal is used for illumination.

14. The twenty-seventh request is excepted to for the reason that it is not supported by the facts averred in the pleadings.

15. The twenty-eighth request is excepted to for the reason that it is not supported by the facts averred in the pleadings.

16. The facts set forth in paragraph twelve of the plaintiff's bill and in the plaintiff's twelfth request for finding of fact were admitted in the defendants' answer subject to the qualification that all of the anthracite coal therein referred to was produced in Pennsylvania. The answer of the Court to this request should be so modified.

56 Respectfully submitted,

GEO. ROSS HULL,
Deputy Attorney General.
EMERSON COLLINS,
Deputy Attorney General.
ROBERT S. GAWTHROP,
First Deputy Attorney General.
GEO. E. ALTER,
Attorney General.

57 (Endorsement:) In the Court of Common Pleas of Dauphin County, Pennsylvania, Sitting in Equity. No. 709, Equity Docket, 1921. Between Roland C. Heisler, Plaintiff, and Thomas Colliery Company, E. Herbert Suender, Superintendent of Thomas Colliery Company, John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company, Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants. Defendants' Exceptions to Plaintiff's Requests for Finding of Fact. Filed Feb'y 2, 1922. George Ross Hull, Emerson Collins, Deputy

Attorneys General; Robert S. Gawthorp, First Deputy Attorney General; George E. Alter, Attorney General, Solicitors for Defendants.

58 *Plaintiffs' Request for Conclusions of Law.*

In the Court of Common Pleas of Dauphin County, Pennsylvania,
Sitting in Equity.

No. 709, Equity Docket, 1921.

Between

ROLAND C. HEISLER, Plaintiff,

and

THOMAS COLLIERY COMPANY, E. HERBERT SUENDER, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurence Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants.

Plaintiffs' Requests for Conclusions of Law.

The learned trial Judge is respectfully requested to make the following conclusions of law:

59 1. The Act of May 11, 1921, is unconstitutional and void in that it offends against the First Section of Article IX of the Constitution of Pennsylvania, which provides as follows:

"All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

Denied.

2. The Act of May 11th, 1921, is unconstitutional and void in that it offends against the Eighth Section of Article III of the Constitution of Pennsylvania, which provides:

"No local or special bill shall be passed unless notice of the intention to apply therefor shall have been published in the locality where the matter or the thing to be affected may be situated; which notice shall be at least 20 days prior to the introduction into the General Assembly of such bill and in the manner to be provided by law; the evidence of such notice having been published shall be exhibited in the General Assembly before such act shall be passed."

Denied.

3. The Act of May 11th, 1921, is void in that it is a local or special bill and notice of the intention to apply therefor was not pub-

lished as required by the provisions of the Act entitled "An Act regulating the publishing of application for local or special legislation," approved February 12th, 1874 (P. L. 43).

Denied.

4. The Act of May 11th, 1921, is void in that its provisions are indefinite and unenforceable for the reason that it is impossible to determine from the Act the exact date on or before which to
€0 file the annual report required by the provisions of the Act to be filed with the Auditor General, and for the further reason that it is impossible to determine from the Act when the penalties imposed thereby for neglect or failure to make said report are incurred, and for other reasons said Act is indefinite and unenforceable and therefore void.

Denied.

5. The Act of May 11th, 1921, is unconstitutional and void because it is in contravention of Clause 5 of Section 9 of Article I of the Constitution of the United States which provides that—

"No tax or duties shall be laid on articles exported from the State."

This constitutional provision is violated for the reason that the larger part of anthracite coal is exported from the State.

Denied.

6. The Act of May 11th, 1921, is unconstitutional and void for the reason that it is in violation of Clause 3 of Section 8 of Article 1 of the Constitution of the United States, which provides that—

"Congress shall have the power to regulate commerce with foreign nations and among the several States and with the Indian Territories."

This provision of the Constitution of the United States is violated for the reason that the larger part of the production of anthracite coal is used in interstate commerce among the several States and foreign nations, and it is beyond the power of the Legislature of

81 Pennsylvania to interfere with such interstate commerce by imposing an arbitrary, unjust and unreasonable tonnage tax on an article of interstate commerce.

Denied.

7. The Act of May 11th, 1921, is unconstitutional and void for the reason that it is in contravention of that portion of the Fourteenth Amendment of the Constitution of the United States, which reads as follows—

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall

any State deprive any person of life, liberty or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

The deposits of anthracite coal in Pennsylvania are to be enjoyed by the citizens of all the States.

Denied.

8. It not appearing from the pleadings nor from the Court's knowledge of the facts that there has been any material change in the characteristics and uses of bituminous and anthracite coal since 1915, no reason appears for a reversal of the decisions by the Supreme Court of Pennsylvania in *Commonwealth vs. Alden Coal Co.*, 251 Pa. 134, and *Commonwealth vs. St. Clair Coal Co.*, 251 Pa. 159.

Denied.

REESE H. HARRIS,
HENRY S. DRINKER, Jr.,
WILLIAM S. JENNEY,
FRANK W. WHEATON,
By H. S. DRINKER, Jr.,
Attorneys for Plaintiff.

62 (Endorsement:) No. 709, Equity Docket, 1921. In the Court of Common Pleas for Dauphin County, Penna., Sitting in Equity. Between Roland C. Heisler, Plaintiff, and Thomas Colliery Company, E. Herbert Suender, Superintendent of Thomas Colliery Company, John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company, Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania. Plaintiffs' Requests for Conclusions of Law. Filed Feb'y 2, 1922. Reese H. Harris, Henry S. Drinker, Jr., William S. Jenney, Frank M. Wheaton, Attorneys for Plaintiff.

63 *Exceptions to Plaintiff's Requests for Conclusions of Law.*

In the Court of Common Pleas of Dauphin County, Pennsylvania,
Sitting in Equity.

No. 709, Equity Docket 1921.

Between

ROLAND C. HEISLER, Plaintiff,

and

THOMAS COLLIERY COMPANY, E. HERBERT SUENDER, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants.

Exceptions to Plaintiff's Requests for Conclusions of Law.

All of the plaintiff's requests for conclusions of law are hereby excepted to.

Respectfully submitted,

GEO. ROSS HULL,
EMERSON COLLINS,
Deputy Attorneys General.
ROBERT S. GAWTHROP,
First Deputy Attorney General.
GEO. E. ALTER,
Attorney General.

64 (Endorsement:) In the Court of Common Pleas of Dauphin County, Pennsylvania, Sitting in Equity. No. 709, Equity Docket, 1921. Between Roland C. Heisler, Plaintiff, and Thomas Colliery Company, E. Herbert Suender, Superintendent of Thomas Colliery Company, John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company, Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants. *Exceptions to Plaintiff's Requests for Conclusions of Law.* George Ross Hull, Emerson Collins, Deputy Attorneys General, Robert S. Gawthrop, First Deputy Attorney General, George E. Alter, Attorney General, Solicitors for Defendants. Filed Feby. 2, 1922.

65

Defendants' Requests for Findings of Fact.

In the Court of Common Pleas of Dauphin County, Pennsylvania,
Sitting in Equity.

No. 709, Equity Docket 1921.

Between

ROLAND C. HEISLER, Plaintiff,

and

THOMAS COLLIERY COMPANY, E. HERBERT SUENDER, Superintendent of Thomas Colliery Company; John Gilbert, Jeese W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants.

Defendants' Requests for Findings of Fact.

To the Honorable the Judges of said court:

The defendants respectfully request the Court to find the following facts:

66 1. The coal sometimes known as semi-bituminous is a grade of bituminous coal higher in its percentage of fixed carbon and lower in its percentage of volatile matter than is ordinarily the case in bituminous coal.

Affirmed.

2. The coal sometimes known as semi-anthracite is a low grade of anthracite coal containing some volatile matter and a lower percentage of fixed carbon than is ordinarily the case with anthracite coal.

Affirmed.

3. The total quantity of anthracite coal produced in Pennsylvania is about one hundred and sixty-three times the quantity of semi-anthracite coal produced in Pennsylvania.

Affirmed.

4. The quantity of semi-bituminous coal produced in Pennsylvania is very small compared with the total amount of bituminous coal produced in Pennsylvania.

Affirmed.

5. Anthracite coal differs from bituminous coal in the following physical properties: the amount of fixed carbon, the amount of volatile matter, color, lustre and structural character. The percentage of fixed carbon in anthracite coal is much higher, and the percentage of volatile matter is much lower than in bituminous coal. Anthracite coal is hard, compact and comparatively clean and free from dust and is commonly termed "hard coal," while bituminous coal is very much less hard, and is dusty and dirty and is commonly termed "soft coal."

Affirmed.

67 6. The fuel ratio (ascertained by dividing the percentage of fixed carbon by the percentage of volatile matter) of bituminous coal differs from that of anthracite coal and as the fuel ratio of bituminous coal rises the coal is more soft, and as the fuel ratio of anthracite coal rises the coal is more hard.

Affirmed.

7. Substantially all anthracite coal is used for fuel only, but bituminous coal is used not only for fuel but as a raw material from which a great number and variety of commercial products are manufactured.

Except as to structure, the general difference in physical properties between bituminous and anthracite coal is the same as the difference between bituminous coal and coke, a product which is manufactured from bituminous coal.

Affirmed.

8. No county in Pennsylvania produces both anthracite and bituminous coal. Wherever one is present in Pennsylvania the other is absent.

Affirmed.

9. Both bituminous and anthracite were originally deposits of vegetable matter and have been brought to their present forms by the processes of nature. According to the commonly accepted theory anthracite, however, has been subjected to a process which has not been applied to bituminous, whereby, through the application of heat, a large proportion of the volatile matter has been removed, as it is removed from bituminous coal in the manufacture of coke.

Affirmed.

68 10. The difference between anthracite, a product of nature, and coke, which is produced from bituminous coal by a process of manufacture, consists in the structure, that of coke being cellular, while the pressure to which anthracite has been subjected has rendered it a hard, compact substance.

Affirmed.

11. Bituminous coal burns with more or less smoke—most of it with a dense smoke—by reason of which some municipalities impose regulations requiring special appliances to abate the “smoke nuisance,” while anthracite burns with a practically smokeless flame.

We find that bituminous coal burns with more or less smoke while anthracite burns with practically no smoke. The municipal regulations we think are immaterial.

12. Sixty-one per cent of anthracite coal produced in Pennsylvania is used for domestic purposes and substantially all anthracite coal is used for fuel in the production of heat for domestic purposes and of steam for domestic purposes and for power.

Affirmed.

13. A small percentage of anthracite produced in Pennsylvania is used in the production of gases, known as water-gas and producer-gases. Said gases, which are also produced from coke, are of a different character from that produced from bituminous coal. The gas produced from bituminous coal, known as coal gas, is produced from the volatile matter in said coal, while the said gases produced from anthracite are obtained by mixing the carbon of the coal combined with oxygen, in the form of C. O., with nitrogen from the air, to obtain producer-gas, or with hydrogen from superheated water vapor, to obtain water-gas.

Affirmed.

14. Bituminous coal is divided into two types—caking and non-caking or splint coal, that is, coals that will intumesce or run together in burning and those which do not run together but remain separate like blocks of wood. Practically all (at least 99 per cent) of the bituminous coal produced in Pennsylvania is of the caking type. This caking property is the foundation of the coking industry. While practically all of the bituminous coal of Pennsylvania is caking coal as aforesaid, not all of it will make commercially acceptable coke because of the percentage of phosphorus or sulphur. Methods of eliminating these impurities are being developed, whereby the percentage of the Pennsylvania bituminous coal available for the manufacture of marketable coke is increasing. Recent experiments in by-product ovens indicate that practically all the bituminous coal in Pennsylvania will be available for the manufacture of marketable coke when the elimination of high sulphur and high phosphorus has been accomplished.

Affirmed.

15. In the year 1918 more than one-quarter of the bituminous coal produced in Pennsylvania was used in the manufacture of coke. Later statistics are not available. Of the coal so used, approximately 2 per cent was manufactured into coke by the “beehive oven process” and approximately 28 per cent by the “by-product process.” The said beehive process is the old fashioned process and is being

rapidly replaced by the by-product process. The said by-product process is usually operated near the place of consumption of the coke, with coal purchased from more than one source, and about one-half the coal produced in Pennsylvania and used in said process in 1918 was so used at points outside the State. Each process eliminates from the coal a large percentage of the volatile matter for the purpose of producing the coke. In the beehive process the volatile

matter so extracted is dissipated in the atmosphere and lost, while in the by-product process the gas liberated is saved and used for fuel and illumination and, with some resultant chemical changes and by distillation and condensation, volatile matter is recovered in the form of tar or pitch, ammonia (used largely in the manufacture of fertilizers), cyanide and benzol and other oils used to generate power by internal combustion and for other purposes.

Affirmed.

16. Much of the tar or pitch so recovered is used, among other purposes, in materials for the surfacing of highways, the State Highway Department of Pennsylvania using annually from 3,000,000 to 6,000,000 gallons of such tar or pitch for such purpose.

Affirmed.

17. From said tar or pitch there are extracted by various processes certain products which, though it is possible to extract them from anthracite, cannot be produced therefrom in quantities rendering such production commercially practicable and none of which are in practice produced therefrom. Said products include:

- Saccharine, a substitute for sugar;
- Lampblack;
- Dyes;
- Sulphur compounds;
- Indigo;
- Carbolic acid and other antiseptics and germicides;
- Explosives, including picric acid, "T. N. T." etc.;
- Flavoring materials;
- Hydroquinine, for photographic development;
- Paints;
- Cleansing compounds and paint removers;
- Chloride;
- Creosote;
- 71 Perfumery;
- And hundreds of medicinal and other products in common use.

Affirmed.

18. Coke cannot be made from anthracite coal.

Affirmed.

19. For the year 1917, the latest figures available, approximately 35 per cent of the coal used in the said by-product process in the United States, and more than half of that used in the beehive process was produced in Pennsylvania. In the year 1918 the quantities produced and the prices of the quantities sold of certain of the by-products obtained in the said by-product process operations in the United States were as follows: tar, 263,299,470 gallons, \$6,364,972; ammonia, 501,618,293 pounds, \$26,442,951; gas, 385,035,154,000 cubic feet, \$13,699,515; benzol products, 145,405,811 gallons, \$25,-688,446; naphthaline, 16,087,496 pounds, \$650,229; other products, \$1,756,345; total, \$74,602,458.

Affirmed.

20. In 1918 the total production of coke in the United States was about 56,000,000 tons of a value of about \$382,000,000 at the ovens, and of said total production about 47 per cent was produced in Pennsylvania.

Affirmed.

21. A large amount of bituminous coal produced in Pennsylvania is used in the production of gas for fuel and illumination in addition to the gas produced in connection with the manufacture of coke as aforesaid.

Affirmed.

22. The railroads of Pennsylvania, in their commodities classification, place coal in two classes—bituminous and anthracite. Anthracite is subclassified into at least three classes: (a) domestic sizes (larger than pea coal); (b) pea coal; (c) smaller than pea coal; all carrying different freight rates.

Affirmed. We cannot say that it is not material in determining the classification for the purpose of taxation.

23. The Congress of the United States, in levying import taxes, has placed bituminous and anthracite coal in separate classes in the following instances:

(a) The Act of March 2, 1861 (12 Stat. L. 178, 182) placed a tax of \$1 per ton on bituminous coal and a tax of fifty cents per ton on all other coal.

(b) The Act of June 30th, 1864, (13 Stat. L. 202, 206), placed a tax of \$1.25 a ton on bituminous coal and shale and a tax of 40 cents per ton on all other coal.

(c) The Act of July 14th, 1870 (16 Stat. L. 256, 266), passed to remove certain commodities from the taxable list to the free list, enumerates anthracite coal as one of said commodities.

(d) In the Act of March 3d, 1883 (22 Stat. L. 488, 511), a tax of 75 cents per ton is laid on bituminous coal and anthracite is named on the free list.

(e) In the Act of October 1st, 1890 (26 Stat. L. 587, 600), a tax of 75 cents per ton is laid on bituminous coal and anthracite coal is named on the free list.

(f) In the Act of August 27th, 1894 (28 Stat. L. 509, 533), a tax of 40 cents per ton is laid on bituminous coal and anthracite coal is named on the free list.

(g) In the Act of July 24th, 1897 (30 Stat. L. 151, 190), a tax of 87 cents per ton is laid on bituminous coal and all coal containing less than 92 per cent. of fixed carbon and anthracite coal, not specially provided for in the Act, is named on the free list.

73 (h) In the Act of August 5th, 1909 (36 Stat. L. Part one 11, 65), a tax of 45 cents per ton is laid on bituminous coal and anthracite coal is named on the free list.

The present Tariff Act of 1913 places all coal on the free list.

Affirmed for the reason given in making the 22d finding.

24. The Canadian Parliament, in levying import taxes, has placed bituminous and anthracite coal in separate classes in the following instances:

(a) In Vol. I of the Revised Statutes of Canada, 1886, Chapter 38, page 373, a tax of 50 cents per ton of 2,000 pounds was placed on anthracite coal and a tax of 60 cents per ton of 2,000 pounds was placed on bituminous coal.

(b) By the Act of June 23d, 1887, page 130 (Chapter 39), anthracite coal was placed on the free list, the duty on bituminous coal being retained.

(c) By the Act of July 23d, 1894, a tax of 60 cents per ton of 2,000 pounds was placed on bituminous coal and anthracite coal was placed on the free list.

(d) By the Act of June 29th, 1897, pages 85 and 101, rates of taxation, dependent upon the sizes, were placed upon bituminous coal and anthracite coal was placed on the free list.

Affirmed for the reason given in making the 22d finding.

25. By Act approved May 18th, 1878, P. L. 67, the standard weight of bituminous coal in this Commonwealth is fixed at seventy-six pounds to the bushel and 2,000 pounds to the ton, penalties being imposed upon persons engaged in the mining of bituminous coal who shall fix any other standard. By Act approved June 26th, 1895, P. L. 334, the weight of 2,240 pounds avoirdupois is made to constitute the legal ton of anthracite coal in the Commonwealth in all transactions between retail coal dealers and their customers.

Affirmed.

74 28. The price of anthracite on cars at the mine is ordinarily much larger than the price of bituminous on cars at the mine, the difference resulting largely from differences in rates of royalty and cost of production and preparation for market.

Affirmed.

27. The State of Pennsylvania has enacted two separate and distinct laws regulating the mining of coal, to wit: the Act of June 2d, 1891, P. L. 176, and its supplements regulating only the mining and preparation of anthracite, and the Act of June 9th, 1911, P. L. 756, and its supplements applying only to the mining of bituminous coal.

Affirmed.

28. Anthracite coal and bituminous coal are two distinctly different commodities and are recognized as such in the commercial world and by the public generally.

Affirmed.

29. In addition to coke and the gas used for fuel and illumination, there is extracted from bituminous coal a large number of commercial products not used or usable for fuel purposes.

Affirmed.

GEO. ROSS HULL,
Deputy Attorney General;
 EMERSON COLLINS,
Deputy Attorney General;
 ROBERT S. GAWTHROP,
First Deputy Attorney General;
 GEO. E. ALTER,
Attorney General,
Solicitors for Defendants.

75 (Endorsement:) In the Court of Common Pleas of Dauphin County, Pennsylvania, Sitting in Equity. No. 709. Equity Docket, 1921. Between Roland C. Heisler, Plaintiff, and Thomas Colliery Company, E. Herbert Suender, Superintendent of Thomas Colliery Company, John Gilbert, Jesse W. Powell, Laurance Bulter, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company, Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants. Defendants' Requests for Findings of Fact. George Ross Hull, Emerson Collins, Deputy Attorneys General; Robert S. Gawthrop, First Deputy Attorney General; George E. Alter, Attorney General, Solicitors for Defendants. Filed Feby 2, 1922.

Defendants' Requests for Conclusions of Law.

In the Court of Common Pleas of Dauphin County, Pennsylvania,
Sitting in Equity.

No. 709, Equity Docket, 1921.

Between

ROLAND C. HEISLER, Plaintiff,

and

THOMAS COLLIERY COMPANY, E. HERBERT SUENDER, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurence Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants.

Defendants' Requests for Conclusions of Law.

To the honorable the judges of said court:

The defendants respectfully request the Court to find the following conclusions of law:

1. The Act of General Assembly No. 225 approved May 11th, 1921, entitled "An Act imposing a State tax on anthracite coal providing for the assessment and collection thereof, and providing penalties for violations of this Act," is not in violation of any provision of the Constitution of Pennsylvania or of the Constitution of the United States.

Affirmed.

2. The Act of May 11th, 1921, is not in violation of Section 1 of Article IX of the Constitution of Pennsylvania.

Affirmed.

3. The Act of May 11th, 1921, is not in violation of Section 8 of Article III of the Constitution of Pennsylvania.

Affirmed.

4. The Act of May 11th, 1921, is not in violation of Clause 5, Section 9, Article I, of the Constitution of the United States.

Affirmed.

5. The Act of May 11th, 1921, is not in violation of Clause 8, Section 8, Article I, of the Constitution of the United States.

Affirmed.

6. The Act of May 11th, 1921, is not in violation of the Fourteenth Amendment of the Constitution of the United States.

Affirmed.

7. The plaintiff is not entitled to the relief prayed for in his bill.

Affirmed.

GEO. ROSS HULL,
Deputy Attorney General;
EMERSON COLLINS,
Deputy Attorney General;
ROBERT S. GAWTHROP,
First Deputy Attorney General;
GEO. E. ALTER,
Attorney General,
Solicitors for Defendants.

78 (Endorsement:) In the Court of Common Pleas of Dauphin County, Pennsylvania, Sitting in Equity. No. 709, Equity Docket, 1921. Between Roland C. Heisler, Plaintiff, and Thomas Colliery Company; E. Herbert Suender, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company, Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants. Defendants' Requests for Conclusions of Law. Filed Feb'y 2, 1922. George Ross Hull, Emerson Collins, Deputy Attorneys General; Robert S. Gawthrop, First Deputy Attorney General; George E. Alter, Attorney General, Solicitors for Defendants.

79 *Plaintiff's Exceptions to Defendants' Requests for Findings of Fact and Conclusions of Law.*

In the Court of Common Pleas of Dauphin County, Pennsylvania,
Sitting in Equity.

No. 709, Equity Docket, 1921.

Between

ROLAND C. HEISLER, Plaintiff,

and

THOMAS COLLIERY COMPANY, E. HERBERT SUENDER, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurence Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants.

Plaintiff's Exceptions to Defendants' Requests for Findings of Fact and Conclusions of Law.

To the honorable the judges of said court:

Plaintiff excepts to the following requests for findings of fact submitted by the defendants:

1. The plaintiff excepts to the third request of defendants for findings of fact for the reason that same is immaterial, the said request being as follows:

"3. The total quantity of anthracite coal produced in Pennsylvania is about one hundred and sixty-three times the quantity of semi-anthracite coal produced in Pennsylvania."

2. The plaintiff excepts to the fourth request of defendants for findings of fact for the reason that the same is immaterial, the said request being as follows:

80 "4. The quantity of semi-bituminous coal produced in Pennsylvania is very small compared with the total amount of bituminous coal produced in Pennsylvania."

3. The plaintiff excepts to the fifth request for finding of fact of the defendants, which said request is as follows:

"5. Anthracite coal differs from bituminous coal in the following physical properties: the amount of fixed carbon, the amount of volatile matter, color, lustre and structural character. The percentage of fixed carbon in anthracite coal is much higher, and the percentage of volatile matter is much lower than in bituminous coal. Anthra-

ite coal is hard, compact and comparatively clean and free from dust and is commonly termed 'hard coal,' while bituminous coal is very much less hard, and is dusty and dirty and is commonly termed 'soft coal.' "

This request is excepted to for the reason that it is immaterial and misleading, in that the different kinds of anthracite coal differ materially from each other in their relative hardness, compactness and cleanliness, and also in the amount of fixed carbon, volatile matter, color, lustre and structural character, and there is as much difference in some of said characteristics in the different grades of anthracite and semi-anthracite coal as there are in certain grades of semi-anthracite, semi-bituminous and bituminous coal.

4. The plaintiff excepts to the sixth request for finding of fact of the defendants, said request being as follows:

"6. The fuel ration (ascertained by dividing the percentage of fixed carbon by the percentage of volatile matter) of bituminous coal differs from that of anthracite coal and as the fuel ratio of bituminous coal rises the coal is more soft, and as the fuel ratio of anthracite coal rises the coal is more hard."

81 This request is excepted to for the reason that it is immaterial.

5. The plaintiff excepts to the first paragraph of the seventh request for finding of fact submitted by the defendants, said seventh request being as follows:

"7. Substantially all anthracite coal issued for fuel only, but bituminous coal is used not only for fuel but as a raw material from which a great number and variety of commercial products are manufactured.

"Except as to structure, the general difference in physical properties between bituminous and anthracite coal is the same as the difference between bituminous coal and coke, a product which is manufactured from bituminous coal."

The first paragraph of the foregoing request is excepted to for the reason that it is not based upon any allegation of fact in the answer. Bituminous coal is used in part for the production of coke for fuel purposes, and in the manufacture of the latter certain by-products result. The principal use, however, of such bituminous coal is for fuel, and the allegation that a portion of said bituminous coal is used as a raw material is not correct, as set forth in said request.

6. The plaintiff excepts to the eighth request for finding of fact of the defendants, said request being as follows:

"8. No county in Pennsylvania produces both anthracite and bituminous coal. Wherever one is present in Pennsylvania the other is absent."

This request is excepted to for the reason that it is immaterial and for the further reason that while it is alleged is a fact in the

answer that wherever one kind of coal is present in Pennsylvania the other is absent, said allegation is based upon present information and knowledge only, and it is impossible as a scientific matter to determine or for the Court to find whether the two kinds of coal may not exist in the same locality at the present time as further scientific investigation is made and geological information developed.

7. The plaintiff excepts to the ninth request for finding of fact of the defendants, said request being as follows:

"9. Both bituminous and anthracite were originally deposits of vegetable matter and have been brought to their present forms by the processes of nature. According to the commonly accepted theory anthracite, however, has been subjected to a process which has not been applied to bituminous, whereby through the application of heat, a large proportion of the volatile matter has been removed, as it is removed from bituminous coal in the manufacture of coke."

This request is excepted to for the reason that it is immaterial.

8. The plaintiff excepts to the eleventh request for finding of fact of the defendants, said request being as follows:

"11. Bituminous coal burns with more or less smoke—most of it with a dense smoke—by reason of which some municipalities impose regulations requiring special appliances to abate the 'smoke nuisance,' while anthracite burns with a practically smokeless flame."

This request is excepted to for the reason that it is immaterial.

9. The plaintiff excepts to the twelfth request for finding of fact of the defendants, said request being as follows:

83 "12. Sixty-one per cent. of anthracite coal produced in Pennsylvania is used for domestic purposes and substantially all anthracite coal is used for fuel in the production of heat for domestic purposes and of steam for domestic purposes and for power."

This request is excepted to for the reason that it is immaterial.

10. The plaintiff excepts to the thirteenth request for finding of fact of the defendants, said request being as follows:

"13. A small percentage of anthracite produced in Pennsylvania is used in the production of gases, known as water gas and producer-gas. Said gases, which are also produced from coke, are of a different character from that produced from bituminous coal. The gas produced from bituminous coal, known as coal gas, is produced from the volatile matter in said coal, while the said gases produced from anthracite are obtained by mixing the carbon of the coal combined with oxygen, in the form of C I, with nitrogen from the air, to obtain producer-gas, or with hydrogen from super-heated water vapor, to obtain water-gas."

This request is excepted to for the reason that it is immaterial.

11. The plaintiff excepts to the fourteenth request for finding of fact of the defendants, said request being as follows:

"14. Bituminous coal is divided into two types—caking and non-caking or splint coal, that is, coals that will intumescence or run together, in burning and those which do not run together but remain separate like blocks of wood. Practically all (at least ninety-nine per cent.) of the bituminous coal produced in Pennsylvania is of the caking type. This caking property is the foundation of the coking industry. While practically all of the bituminous coal of Pennsylvania is caking coal as aforesaid, not all of it will cake commercially acceptable coke because of the percentage of phosphorus or sulphur. Methods of eliminating these impurities are being developed, whereby the percentage of the Pennsylvania bituminous coal available for the manufacture of marketable coke is increasing. Recent experiments in by-product ovens indicate that practically all the bituminous coal in Pennsylvania will be available for the manufacture of marketable coke when the elimination of high sulphur and high phosphorus has been accomplished."

This request is excepted to for the reason that it is immaterial.

12. The plaintiff excepts to the fifteenth request for finding of fact of the defendants, said request being as follows:

"15. In the year 1918 more than one quarter of the bituminous coal produced in Pennsylvania was used in the manufacture of coke. Later statistics are not available. Of the coal so used, approximately seventy-two per cent. was manufactured into coke by the 'beehive oven process' and approximately twenty-eight per cent. by the 'by-product process.' The said beehive process is the old fashioned process and is being rapidly replaced by the by-product process. The said by-product process is usually operated near the place of consumption of the coke, with coal purchased from more than one source, and about one-half the coal produced in Pennsylvania and used in said process in 1918 was so used at points outside the State. Each process eliminates from the coal a large percentage of the volatile matter for the purpose of producing the coke. In the beehive process the volatile matter so extracted is dissipated in the atmosphere and lost, while in the by-product process the gas liberated is saved and used for fuel and illumination and, with some resultant chemical changes and by distillation and condensation, volatile matter is recovered in the form of tar or pitch, ammonia (used largely in the manufacture of fertilizers), cyanide and benzol and other oils used to generate power by internal combustion and for other purposes."

This request is excepted to for the reason that it is immaterial.

13. The plaintiff excepts to the sixteenth request for finding of fact of the defendants, said request being as follows:

"16. Much of the tar or pitch so recovered is used, among other purposes, in materials for the surfacing of highways, the State Highway Department of Pennsylvania using annually from 3,000,000 to 6,000,000 gallons of such tar or pitch for such purpose."

This request is excepted to for the reason that it is immaterial.

14. The plaintiff excepts to the seventeenth request for finding fact of the defendants, said request being as follows:

"17. From said tar or pitch there are extracted by various processes certain products which, though it is possible to extract them from anthracite, cannot be produced therefrom in quantities rendering such production commercially practicable and none of which are in practice produced therefrom. Said products include:

"Saccharine, a substitute for sugar; Lampblack; Dyes; Sulphur compounds; Indigo; Carbolic acid and other antiseptics and germicides; Explosives, including picric acid, 'T. N. T.' etc.; Flavoring materials; Hydroquinine, for photographic development;
86 Paints; Cleansing compounds and paint removers; Chloride of Creosote; Perfumery; and hundreds of medicinal and other products in common use."

This request is excepted to for the reason that it is immaterial.

15. The plaintiff excepts to the eighteenth request for finding fact of the defendants, said request being as follows:

"18. Coke cannot be made from anthracite coal."

This request is excepted to for the reason that it is immaterial and for the further reason that although that fact is alleged in the defendants' answer, such allegation is based only upon present scientific knowledge. What scientific developments may be made in the future in the manufacture of coke cannot now be determined.

16. The plaintiff excepts to the nineteenth request for finding fact of the defendants, said request being as follows:

"19. For the year 1917, the latest figures available, approximately thirty-five per cent of the coal used in the said by-product process in the United States, and more than half of that used in the beehive process was produced in Pennsylvania. In the year 1918 the quantities produced and the prices of the quantities sold of certain of the by-products obtained in the said by-product process operations in the United States were as follows: tar, 263,299,470 gallons, \$6,384,972; ammonia, 501,618,293 pounds, \$26,442,951; gas, 385,035,154,000 cubic feet, \$13,699,515; benzol products, 145,405,811 gallons, \$25,688,446; naphthalene, 16,087,498 pounds, \$650,229; other products \$1,756,345; total, \$74,602,458."

87 This request is excepted to for the reason that it is immaterial.

17. The plaintiff excepts to the twentieth request for finding of fact of the defendants, said request being as follows:

"20. In 1918 the total production of coke in the United States was about 56,000,000 tons of a value of about \$382,000,000 at the ovens, and of said total production about forty-seven per cent was produced in Pennsylvania."

This request is excepted to for the reason that it is immaterial.

18. The plaintiff excepts to the twenty-first request for finding of fact of the defendants, said request being as follows:

"21. A large amount of bituminous coal produced in Pennsylvania is used in the production of gas for fuel and illumination in addition to the gas produced in connection with the manufacture of coke as aforesaid."

This request is excepted to for the reason that it is immaterial.

19. The plaintiff excepts to the twenty-second request for finding of fact of the defendants, said request being as follows:

"22. The railroads of Pennsylvania, in their commodities classification, place coal in two classes—bituminous and anthracite. Anthracite is sub-classified into at least three classes: (a) domestic sizes (larger than pea coal); (b) pea coal; (c) smaller than pea coal; all carrying different freight rates."

88 This request is excepted to for the reason that it is immaterial.

20. The plaintiff excepts to the twenty-third request for finding of fact of the defendants, said request being as follows:

"23. The Congress of the United States, in levying import taxes, has placed bituminous and anthracite coal in separate classes in the following instances:

"(a) The Act of March 2d, 1861 (12 Stat. L. 178, 182) placed a tax of \$1 per ton on bituminous coal and a tax of 50 cents per ton on all other coal.

"(b) The Act of June 30th, 1864 (13 Stat. L. 202, 206), placed a tax of \$1.25 a ton on bituminous coal and shale and a tax of 40 cents per ton on all other coal.

"(c) The Act of July 14th, 1870 (16 Stat. L. 256, 266), passed to remove certain commodities from the taxable list to the free list, enumerates anthracite coal as one of said commodities.

"(d) In the Act of March 3d, 1883 (22 Stat. L. 488, 511), a tax of 75 cents per ton is laid on bituminous coal and anthracite is named on the free list.

"(e) In the Act of October 1st, 1890 (28 Stat. L. 567, 600), a tax of 75 cents per ton is laid on bituminous coal and anthracite coal is named on the free list.

"(f) In the Act of August 27th, 1894 (28 Stat. L. 509, 533), a tax of 40 cents per ton is laid on bituminous coal and anthracite coal is named on the free list.

"(g) In the Act of July 24th, 1897 (30 Stat. L. 151, 190), a tax of 67 cents per ton is laid on bituminous coal and all coal containing less than 92 per cent of fixed carbon and anthracite coal, not specially provided for in the Act, is named on the free list.

89 "(h) In the Act of August 5th, 1909 (36 Stat. L. Part one, 11, 65), a tax of 45 cents per ton is laid on bituminous coal and anthracite coal is named on the free list.

"The present Tariff Act of 1913, places all coal on the free list."

This request is excepted to for the reason that it is immaterial.

21. The plaintiff excepts to the twenty-fourth request for finding of fact of the defendants, said request being as follows:

"24. The Canadian Parliament, in levying import taxes, has placed bituminous and anthracite coal in separate classes in the following instances:

"(a) In Vol. I of the Revised Statutes of Canada, 1886, Chapter 33, page 373, a tax of 50 cents per ton of 2,000 pounds was placed on anthracite coal and a tax of 60 cents per ton of 2,000 pounds was placed on bituminous coal.

"(b) By the Act of June 23d, 1887, page 130 (Chapter 39), anthracite coal was placed on the free list, the duty on bituminous coal being retained.

"(c) By the Act of July 23d, 1894, a tax of 60 cents per ton of 2,000 pounds was placed on bituminous coal and anthracite coal was placed on the free list.

"(d) By the Act of June 29th, 1897, pages 85 and 101, rates of taxation, dependent upon the sizes, were placed upon bituminous coal and anthracite coal was placed on the free list."

This request is excepted to for the reason that it is immaterial.

22. The plaintiff excepts to the twenty-fifth request for finding of fact of the defendants, said request being as follows:

90 "25. By act approved May 18th, 1879, P. L. 67, the standard weight of bituminous coal in this Commonwealth is fixed at seventy-six pounds to the bushel and 2,000 pounds to the ton, penalties being imposed upon persons engaged in the mining of bituminous coal who shall fix any other standard. By Act approved June 26th, 1895, P. L. 334, the weight of 2,240 pounds avoirdupois is made to constitute the legal ton of anthracite coal in the Common-

wealth in all transactions between retail coal dealers and their customers."

This request is excepted to for the reason that it is immaterial.

23. The plaintiff excepts to the twenty-sixth request for finding of fact of the defendants, said request being as follows:

"26. The price of anthracite on cars at the mine is ordinarily much larger than the price of bituminous on cars at the mine, the difference resulting largely from differences in rates of royalty and cost of production and preparation for market."

This request is excepted to for the reason that it is immaterial.

24: The plaintiff excepts to the twenty-seventh request for finding of fact of the defendants, said request being as follows:

"27. The State of Pennsylvania has enacted two separate and distinct laws regulating the mining of coal, to wit: the Act of June 2d, 1891, P. L. 176, and its supplements regulating only the mining and preparation of anthracite, and the Act of June 9th, 1911, P. L. 756, and its supplements applying only to the mining of bituminous coal."

This request is excepted to for the reason that it is immaterial.

91 25. The plaintiff excepts to the twenty-eighth request for finding of fact of the defendants, said request being as follows:

"28. Anthracite coal and bituminous coal are two distinctly different commodities and are recognized as such in the commercial world and by the public generally."

This request is excepted to for the reason that it embodies a conclusion which is incorrect and which is not borne out by the record.

26. The plaintiff excepts to the twenty-ninth request for finding of fact of the defendants, said request being as follows:

"29. In addition to coke and the gas used for fuel and illumination, there is extracted from bituminous coal a large number of commercial products not used or usable for fuel purposes."

The said request is excepted to for the reason that it is immaterial and further for the reason that the conclusion therein stated is incorrect and misleading, in so much as the products therein referred to are not extracted bodily from bituminous coal but manufactured from ingredients obtained in part from bituminous coal.

Plaintiff's Exceptions to Defendants' Requests for Conclusions of Law.

The plaintiff excepts to the first, second, third, fourth, fifth, sixth and seventh requests for conclusions of law submitted by the defendants.

REESE H. HARRIS,
HENRY S. DRINKER, JR.,
WILLIAM S. JENNEY,
FRANK W. WHEATON,
Attorneys for Plaintiff,
By H. S. DRINKER, JR.

92 (Endorsement:) No. 709, Equity Docket, 1921. Court of Common Pleas of Dauphin County, Pennsylvania, Sitting in Equity. Between Roland C. Heisler, Plaintiff, and Thomas Colliery Company; E. Herbert Suender, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company, Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania. Plaintiffs' Exceptions to Defendant's Requests for Findings of Fact and Conclusions of Law. Filed Feb'y 2, 1922. Reese H. Harris, Henry S. Drinker, Jr., William S. Jenney, Frank W. Wheaton, Attorneys for Plaintiff.

93 *Opinion on Findings of Fact and Conclusions of Law.*

In the Court of Common Pleas of Dauphin County.

In Equity.

No. 709, Equity Docket.

ROLAND C. HEISLER, Plaintiff,

VS.

THOMAS COLLIERY COMPANY, E. HERBERT SUENDER, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants.

Opinion on Findings of Fact and Conclusions of Law.

Because of the importance of this suit, all the Judges of this Court sat as chancellors.

94 The case was submitted on bill and answer, and therefore every material averment of the answer must be taken as true.

The bill attacks the constitutionality of the Act of Assembly approved May 11th, 1921, P. L. 479, entitled "An Act imposing a state tax on anthracite coal; providing for the assessment and collection thereof; and providing penalties for the violation of this act," in that (1) it offends against Section 1 of Article IX of the Constitution of Pennsylvania, which provides that all taxes "shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax;" (2) that it violates Section 8 of Article 3 of the Constitution of Pennsylvania, which prohibits the passage of a local or special bill unless notice of the intention to apply therefor shall have been published; (3) that it violates Clause 5, Section 9 of Article I of the Constitution of the United States which provides that "no tax or duty shall be laid on articles exported from the state;" (4) that it violates Clause 3 of Section 8 of Article I of the Constitution of the United States, which provides that Congress shall have power to regulate commerce with foreign nations and among the several states and with The Indian tribes; (5) that it violates the Fourteenth Amendment of the Constitution of the United States which forbids any state to deprive any person of life, liberty or property without due process of law, and (6) that its provisions are indefinite and unenforceable.

This Act imposes a tax on anthracite coal of one and one-half per centum of the value thereof when prepared for market, which said tax shall be assessed at the time when said coal has been mined, washed or screened and is ready for shipment or market.

The General Assembly of Pennsylvania, by an Act approved June 27th, 1913, P. L. 639, imposed a tax of two and one-half per centum upon anthracite coal and provided that each county should receive from the State Treasurer for the use of the several cities, boroughs and townships thereof, one-half of the tax collected from the operators in said county. The latter feature is not contained in the Act of 1921.

1. As to the classification of anthracite coal for taxation; In the cases of Commonwealth vs. Alden Coal Company, 251 Pa. 134, and Commonwealth vs. St. Clair Coal Co., 251 Pa. 159, the Supreme Court declared the Act of 1913 unconstitutional because it violated Article IX, Section 1 of the Constitution, which requires uniformity of taxation. It is argued by the plaintiff that these cases are binding upon us and that there is nothing for this Court to do but to determine the Act of 1921 unconstitutional for the same reason. The defendants, however, contend that the decision of the Supreme Court in the Alden case was based upon the findings of the Court below in that case, but that the case now presented is so entirely different that we are not bound by the decision in the case of Commonwealth vs. Alden Coal Company. If the cases are similar and the questions presented are the same, it would be judicial effrontery on our part not to follow the decision of the Supreme Court. If, however, facts are now presented, bearing upon the classification of anthracite coal which were not before the Court in the Alden case, and which may fairly lead to a different conclusion as to such classification, the doctrine of stare decisis would not compel us to follow the Alden

case, and we know of no reason why we should not be permitted to come to the conclusion to which such a different state of facts brings us: *Thomas vs. Harris*, 43 Pa. 231.

Mr. Justice Stewart, in the opinion in the Alden case, said (page 142)—

“And so we recur to the main and only inquiry, what difference is there between anthracite and bituminous coal that makes the one, when prepared for market, a proper subject for taxation, and not the other. Our answer must be after the most careful consideration of the question, in the light of the findings of the learned Judge who heard the case in the Court below, and the arguments advanced on the part of the Commonwealth, that we discover none.”

The learned Justice refers to one finding of the Court below, namely, that forty per centum of anthracite coal was sold in keen competition with bituminous coal, in the fuel market, and from it deduces that there is no reasonable basis for putting anthracite in a separate class from bituminous coal for the purpose of taxation. That the majority of the Court based its conclusion upon “the findings of the learned Judge who heard the case in the Court below” is evident from the dissenting opinion of Mr. Justice Frazer, in which Justices Elkin and Potter concurred. In the dissenting opinion Justice Frazer argues that the differences between anthracite and bituminous coal are well known and that because of those differences the conclusion ought to have been reached that there was a reasonable basis for the separate classification of anthracite coal for the purpose of taxation. We must infer that all of the reasons given by Mr. Justice Frazer in his dissenting opinion were urged upon the Court but they were not matters of record and are not included in the findings of the Court below. The majority of the Court rejected them and based its conclusion upon the findings of the Court below. The distinctions to which Mr. Justice Frazer referred, and many others, are now presented in this record. By the findings of fact separately filed in this case it appears that anthracite and bituminous are different kinds of coal and that semi-bituminous is a grade of bituminous, and semi-anthracite a grade of anthracite (plaintiff's eighth request for findings of fact); whereas, by defendant's twelfth request for findings of fact in the Alden case, it appeared that anthracite and bituminous coal were different grades, but not different kinds of coal.

In this case it appears that semi-anthracite is a low grade of anthracite coal and semi-bituminous a grade of bituminous higher in its percentage of fixed carbon and lower in its percentage of volatile matter than is ordinarily found in bituminous coal (Defendants' first and second requests for findings of fact), but in the defendant's ninth request for findings of fact in the Alden case, it was found that anthracite differs from bituminous, semi-anthracite and semi-bituminous only in general appearance and percentage of fixed carbon and volatile matter, and that the line of demarkation between the different grades of coal is so uncertain and

indistinct as to make it difficult to determine to which grade coal belongs, and in the defendant's seventh request for findings of fact in the St. Clair case, that the difference is one of degree and not of kind. In the Alden case it is found that anthracite, bituminous, and semi-bituminous and semi-anthracite are all found in large quantities in Pennsylvania (Defendants' eighth request for findings of fact), but the fact is now found that the quantity of anthracite produced in Pennsylvania is one hundred and sixty-three times the quantity of semi-anthracite and the quantity of semi-bituminous produced in Pennsylvania is very small compared with the total amount of bituminous coal produced therein. Practically all anthracite coal is produced in Pennsylvania and approximately one-third of the bituminous coal in the United States is produced in Pennsylvania (defendants' third and fourth requests for findings of fact, and plaintiff's twelfth request for findings of fact).

We find that anthracite coal differs from bituminous coal in its physical properties, namely, the amount of fixed carbon, the amount of volatile matter, color, lustre, and structural character. The percentage of fixed carbon in anthracite is much higher and the percentage of volatile matter much lower, than in bituminous coal. Anthracite coal is hard, compact, and comparatively clean and free from dust, while bituminous coal is softer, dusty and dirty (defendant's fifth request for findings of fact).

The fuel ratio of bituminous coal differs from that of anthracite coal. The fuel ratio of bituminous coal rises as the coal is more soft, while the fuel ratio of anthracite coal rises as coal is more hard (defendants' sixth request for findings of fact).

Geography also emphasizes the difference between bituminous and anthracite coal, because where one is present the other is absent. No county in Pennsylvania produces both anthracite and bituminous coal (defendants' eighth request for findings of fact). Both bituminous and anthracite coal were originally deposits of vegetable matter, but anthracite has been subjected to a process which has not been applied to bituminous whereby, through the application of heat, a large proportion of the volatile matter has been removed (defendants' ninth request for findings of fact).

When bituminous coal is subjected to a heating process in the manufacture of coke, a large proportion of the volatile matter is removed and the same general difference in the physical properties which exists between bituminous and anthracite coal then exists between bituminous coal and coke (defendants' seventh, eighth and ninth requests for findings of fact).

There is a difference between bituminous coal and anthracite coal in the way in which it burns. Bituminous coal burns with smoke—sometimes a dense smoke, while anthracite coal burns with practically no smoke (defendants' eleventh request for findings of fact).

There is also a distinct difference between the uses to which anthracite and bituminous coal are put. Substantially all anthracite coal is used for fuel only. But bituminous coal is not only used for fuel but as a raw material from which a great number and variety of commercial products are produced (defendants' seventh request

for findings of fact). Sixty-one per centum of anthracite coal produced in Pennsylvania is used for domestic purposes and substantially all anthracite coal is used for fuel in the production of heat for domestic purposes, of steam for domestic purposes and for power (defendants' twelfth request for findings of fact),
99 whereas bituminous coal is almost exclusively used for manufacturing purposes. Ninety-nine per centum of it is of the caking type. Practically 25 per centum of the bituminous coal produced in Pennsylvania was used, in 1918, for the manufacture of coke (defendants' fourteenth and fifteenth requests for findings of fact).

Coke cannot be made from anthracite coal (defendants' eighteenth request for findings of fact).

Seventy-two per centum of the bituminous coal used for the manufacture of coke is by the beehive or old-fashioned process which is rapidly being replaced by the by-product process in which latter process 28 per centum of the bituminous coal used for the manufacture of coke, was consumed in 1918 (defendants' fifteenth request for findings of fact).

In the beehive process the volatile matter is dissipated in the atmosphere and lost, but in the by-product process the liberated gas is saved and used for fuel and illumination and, with some resultant chemical changes and treatment, is recovered in the form of tar or pitch, ammonia, cyanide, benzol and other oils used to generate power by internal combustion and for other purposes (defendants' fifteenth request for findings of fact).

Much of the tar or pitch so produced is used for the surfacing of highways, the State Department of Pennsylvania using from three to six million gallons of such tar annually (Defendants' sixteenth request for findings of fact).

From such tar and pitch is also extracted through various processes products including saccharine, lamp black, dyes, sulphur compounds, carbolic acids and other antiseptics, explosives, including picric acid and T. N. T., flavoring materials, hydro-quinine, paints, cleansing compounds, chloride, creosote, perfumery, and a number of other products (defendants' seventeenth request for finding of fact).

In the year 1917, 35 per centum of the coal used in the by-product process in the United States and more than half of that used in the beehive process was produced in Pennsylvania. In the
100 year 1918, the by-products of the manufacture of coke amounted to \$74,602,458 (defendants' nineteenth request for findings of fact). In 1918, there were 56,000,000 tons of coke produced, of a value of \$382,000,000 at the oven, of which 47 per centum was produced in Pennsylvania (defendants' twentieth request for findings of fact).

A large quantity of bituminous coal is also used in the production of gas for fuel and illumination, in addition to the gas produced in connection with the manufacture of coke (defendants' twenty-first request for findings of fact).

The differences between anthracite and bituminous coal in their physical properties and uses, were not before the Court in the Alden

case. Mr. Justice Frazer urged some of these differences upon the Court, because they "are recognized by leading writers on geology and coal," and because they "seem amply sufficient to justify a classification for the purpose of taxation" (page 151). But it is apparent that the majority of the Court refused to go outside of the record and limited its considerations to the findings of the learned Judge who heard the case in the Court below, and the arguments advanced on the part of the Commonwealth. As to these arguments Mr. Justice Stewart said (page 141):

"A single difference as a basis of classification is suggested in the brief of argument on behalf of appellee. It is thus stated in the brief submitted, 'the court, of its own knowledge, knows that the price of anthracite coal ranges from four to eight dollars per ton, and the price of bituminous coal ranges from one to two dollars per ton.' * * * There may be something herein implied that would indicate a difference beyond that of market price in the two varieties, but certainly nothing beyond it is expressed. * * * The one reason expressed is so wholly inadequate as a basis of differentiation that we need take no time in discussing it. It involves the
101 proposition that it is competent for the Legislature by process of classification on the basis of market value, to throw the entire burden of the tax upon a selected few of an entire class, indistinguishable in its members in any other regard. And yet on this very crux of the case we have but this one suggestion of difference as a basis for classification; namely, market price or value."

It needs no argument to demonstrate that the basis of classification now suggested in the case before us is not market value, but differences in the properties, composition, and uses of anthracite and other coal. Moreover, in the Alden case the defendants' tenth request for findings of fact, which was affirmed, was in part as follows:

"The uses to which anthracite coal and other kinds of coal are put are similar and in many instances identical."

Defendants' twelfth request for findings of fact, which was affirmed, was:

"Anthracite coal is used for the same purpose as bituminous, semi-bituminous and semi-anthracite coal—all of the said four grades being used in furnaces, in kitchens and in locomotives."

No such identity of uses is presented in this case. On the other hand, the case before us presents a diversity of uses entirely inconsistent with the findings above quoted. It is true that as to 40 per centum of anthracite coal the findings of fact in the Alden case and in this case are similar. In the Alden case, by the defendants' eleventh request for findings of fact it is determined that the "steam sizes constitute about 40 per centum of the total output of anthracite coal and are sold in competition in the open market with bituminous coal and are used for the same purposes," while by the plaintiff's

thirteenth request for findings of fact in this case, it is determined that 30 per centum of the anthracite coal is "known as steam sizes (smaller sizes than pea), and these steam sizes are sold in direct competition with bituminous, semi-bituminous and semi-anthracite grades of coal in the fuel market both in Pennsylvania and outside of Pennsylvania. Approximately 10 per centum is pea coal which also competes directly with bituminous." There is no finding, however, in this case, that the 40 per centum referred to in the finding just quoted is used for the same purposes as bituminous coal. Even though 40 per centum is used for the same purposes, if the other 60 per centum is not, could it be said that anthracite coal must be limited in its classification because of this competition? We venture to suggest that not only 40 per centum, but 100 per centum of natural gas in Western Pennsylvania comes into direct competition with bituminous or anthracite coal, and perhaps 60 per centum of it comes into direct competition with bituminous coal. Would it be suggested that for that reason natural gas must be classified for taxation as coal? Also, in some portions of Pennsylvania much cord wood is consumed as fuel and comes into direct competition as domestic fuel. Must cord wood, therefore, be taxed in the same class as anthracite coal? The suggestion carries its own answer, and the reason is that the physical properties and composition of natural gas and coal, and cord wood and coal, are so different as to make classification absurd, although there be similar uses and competition. It follows, therefore, that partial competition cannot be the sole test.

To illustrate further, a corporation engaged in a particular locality in harvesting and selling natural ice, would be taxed, while a corporation engaged in the manufacture and sale of artificial ice would be free from tax because it was a manufacturing corporation, although it sold all its ice in direct competition. The commodity, the physical property, the uses, are all the same and the competition is one hundred per centum, so that competition cannot always be the test.

193 Neither can the fact that the two kinds of coal are closely related in their origin, be a determining feature in the question of classification. Crushed stone and building stone are closely related in their origin and to some extent in their uses, because crushed stone becomes a part of the composition of concrete walls which are now often used instead of walls that might otherwise be built of stone, and yet no one would suggest that they could not be separately classified for purposes of taxation. Many other illustrations might be given. As Mr. Justice Clark said, in *Commonwealth vs. Delaware Division Canal Company*, 123 Pa. 594, 622, "illustrations might be multiplied to show that classification does not depend upon differences in the physical nature or condition of the subject selected, but upon a variety of considerations." It is not necessary for us to review the authorities sustaining the right of the Legislature to classify for the purpose of taxation. Ever since *Kitty Roup's case*, 81 *Pa. 211, down to the case of *Commonwealth vs. Alden Coal Company*, the right to classify has been uniformly sustained and in

the multitude of cases there are only one or two instances in which the classification has been denied. The principles are well settled. As they were laid down in the case of *Commonwealth vs. Delaware Division Canal Company*, *supra*, so they remain. In that case Mr. Justice Clark said, page 621:

"Nor is classification necessarily based upon any essential differences in the nature or, indeed, the condition of the various subjects; it may be based as well upon the want of adaptability to the same methods of taxation, or upon the impracticability of applying to the various subjects the same methods, so as to produce just and reasonably uniform results, or it may be based upon well grounded considerations of public policy."

104 It goes without saying that the Legislature cannot revive an unconstitutional Act of Assembly by passing it over again; but while the attack on the constitutionality of the Act of June 27th, 1913, involved in the case of *Commonwealth vs. Alden Coal Company*, was pending, and before it was decided, the Legislature, with the evident purpose of meeting some of the attacks which had been made upon the Act of 1913, passed another Act, approved June 1st, 1915, imposing a tax on anthracite coal, and this Court, in a case precisely similar to the Alden case, declared that Act unconstitutional. The Legislature then (in 1921) again attempted to impose a tax on anthracite coal. We may infer from these repeated efforts by the Legislature, that the people are convinced that some constitutional method should be found to tax this important natural resource of the state. Pennsylvania supplies practically all of the anthracite coal in the United States. To the extent that the anthracite coal is being mined, the wealth of Pennsylvania's natural resources is disappearing and these attempted efforts to tax this natural resource may well be considered an expression by the Legislature of the public policy, or an effort on the part of the Legislature—in the language of Mr. Justice Clark above quoted—to classify anthracite coal for taxation "based upon well grounded considerations of public policy."

In *Knisely vs. Cotterel*, 196 Pa. 614, the Supreme Court, in sustaining the Act of May 2d, 1899, P. L. 184, against an attack upon its constitutionality because it classified wholesale and retail dealers separately, and taxed them differently, called attention to the fact that property might be classified for taxation according to its intended use, saying on page 628:

"The purpose for which property is kept or used has long been a recognized and to some extent a favorite basis for distinction in taxation. Thus household and kitchen furniture in private use have been exempted while the same articles as stock in trade have been taxed; carriages kept for pleasure and watches for private use
105 have been taxed as such, while carriages in livery stables and watches in a jeweler's stock have been exempted or taxed in a different manner or at a different rate. Other examples might be given, and the very tax in controversy here upon dealers, distin-

guished into retailers and wholesalers, has in one form or another, closely analogous, been on the statute books so long that it is one of the most familiar in the history of our taxation. This subject will be further considered later on, but enough has been said here, we think to show that even as a tax on property it is not unconstitutional for want of uniformity."

In the case of *Commonwealth vs. Lehigh Valley Railroad Company*, 244 Pa. 241, the Supreme Court adopted the language of Judge Kunkel, saying:

"The classification is not an arbitrary one but on which actually exists in the business world."

In this connection, while it would be in no sense controlling, it is persuasive that the Congress of the United States in levying import taxes has placed bituminous and anthracite coal in separate classes by eight separate Acts of Congress (defendants' twenty-third request for findings of fact); that the Canadian Parliament, in levying its import taxes, has also placed bituminous and anthracite coal in separate classes, by four different Acts of Parliament (defendants' twenty-fourth request for findings of fact), and the railroads of Pennsylvania in their commodities classification have also placed bituminous and anthracite coal in separate classes, and have sub-classified anthracite into (a) domestic sizes; (b) pea coal; (c) smaller than pea coal—all carrying different freight rates (defendants' twenty-second request for findings of fact). So, in the language of Judge Kunkel, the classification is "one which actually exists in the business world."

When a classification for the purpose of taxation rests upon a substantial difference and a real distinction, the Legislature has the right to make such classification and it is the duty of the Court to sustain it. Upon the showing in the present case there appears to us greater reason to support a classification between bituminous and anthracite coal than that which supported the classification in *Provident Life & Trust Company vs. McCaughn*, 245 Pa. 370. There the law which was sustained separated the securities held by the corporation into two classes: (1) Those owned by the corporation "in which the whole body of stockholders or members as such have the entire equitable interest in remainder," and (2) those held in any other manner.

The plaintiff argues that the law and the facts are exactly the same today as they were in 1915. The law is undoubtedly the same in that it imposes a tax on anthracite coal only. It is not necessary to cite authorities for the proposition that an Act of Assembly may be constitutional or unconstitutional in its application. Its application is determined by the facts. The plaintiff contends that because "coal was coal in 1915 and coal is coal today," and bituminous coal is no softer, or anthracite coal no harder, than it was in 1915, and coke was also made from coal in 1915, and there was competition in 1915, that the facts are the same. These things are all true, but the difficulty with this contention is that the Supreme Court excluded the

consideration of these very things from the case. There is no finding in the Alden case of any of these matters, except that 40 per centum of anthracite coal comes into competition with bituminous. All other facts are excluded by the Supreme Court because they were not found by the Court below, although the minority desired to have some of them considered. If, between 1915 and 1921, the industry had so developed that 90 per centum of the bituminous coal in Pennsylvania was used in the by-product process for the manufacture of coke, could it be said that the facts are the same? The coal would still be coal; anthracite would be no harder, bituminous no softer, and there would be competition in part, yet the use would in that event clearly distinguish anthracite and bituminous coal. We therefore conclude, so far as this case is concerned, that the facts presented are not the same as they were in the Alden case and the application of the law is made to an entirely different state of facts.

We regard it as wholly immaterial that the defendant company, since the decision in the case of Commonwealth vs. Alden Coal Company, supra, expended a large sum of money in constructing and adding permanent improvements to washeries and facilities designed for the recovery and preparation of coal from coal banks and for permanent improvements to its coal mines and collieries, or that other corporations spent large amounts of money for the same purposes. There is no allegation in the bill that these amounts would not have been spent even though a constitutional tax on anthracite coal would be imposed. A corporation cannot assume that the laws relating to taxation will remain the same, make improvements on the strength of such assumption, and interpose as a defense to such taxation the fact that such improvements were made.

Upon the best consideration which we have been able to give to the case now before us, we find that in the case of Commonwealth vs. Alden Coal Company, supra, the Supreme Court declared the Act of June 27th, 1913, P. L. 639 unconstitutional, because there was nothing shown to the Court upon which a substantial difference between anthracite and bituminous coal could rest, and therefore the classification attempted was arbitrary. But in the case before us, substantial differences have been shown and found, and we therefore conclude that it is our duty to sustain the classification made by the Act of May 11th, 1921. In coming to that conclusion, we have given full respect to the decision of the Supreme Court in the case of Commonwealth vs. The Alden Coal Company, as we understand it.

(2) The plaintiff contends that the Act of May 11th, 1921, is unconstitutional because it is a local or special law and no notice was published of its proposed introduction and enactment in the counties or localities in which anthracite coal is found. What we have already said disposes of the contention that the Act is a local or special law. The tax is laid uniformly on all anthracite coal and if the Legislature had the right to classify anthracite coal for the purpose of taxation, it follows that the law is neither local nor special, but a general act which does not require the previous publication of notice of its introduction into the Legislature.

(3) It is contended that the Act is unenforceable because its provisions are indefinite and it is impossible to determine when reports are to be filed, or when penalties may be incurred, for failure to comply with its terms. Section 2 of the Act requires annual reports "on or before the first day of February for the calendar year next preceding" and "in the event of the failure, neglect, or refusal * * * to make the report and valuation to the Auditor General as hereinbefore provided, on or before the first day of February in each and every year, it shall be the duty of the Auditor General to estimate an assessment and valuation of the coal prepared for market * * * and settle an account for taxes, penalties and interest thereon." Section 2 authorizes a penalty of 10 per centum to be added in case of failure to comply with its terms. It is true there is a provision for the imposition of a penalty if the report is not filed on or before the fifteenth of January, but inasmuch as the Act provides in specific terms that the report shall be filed on or before the first day of February, there would be no difficulty in construing the Act so that the penalty could not be imposed for a failure to file the report until after the first day of February. We think, therefore, that this contention does not go to the constitutionality of the Act but is only a matter of construction. It is premature to raise this question now. There is no penalty involved in this suit. It is time enough to raise it when a penalty is imposed.

109 (4) The bill also attacks the constitutionality of the Act on the ground that it violates Clause 5 of Section 9 of Article I of the Constitution of the United States, which provides that "no tax or duties shall be laid on articles exported from the State." This provision of the Federal Constitution refers only to articles shipped out of the country: *Woodruff vs. Parham*, 8 Wall 123; *Brown vs. Huston*, 114 U. S. 622; *Dooley vs. United States*, 182 U. S. 151; *Rothermel vs. Myerle*, 136 Pa. 250, 262.

(5) Nor do we think there is anything in plaintiff's contention that the Act is in violation of Clause 3 of Section 8 of Article I of the Federal Constitution, which provides that "Congress shall have power to regulate commerce with foreign nations and among the several state and with the Indian tribes."

In *Coe vs. Erroll*, 116 U. S., 515, it is held:

"Goods, the product of a State, intended for exportation to another State, are liable to taxation as part of the general mass of property of the State of their origin, until actually started in course of transportation to the State of their destination, or delivered to a common carrier for that purpose. * * *

"When goods, the product of a State, have begun to be transported from that State to another State, and not till then have they become the subject of interstate commerce, and, as such, are subject to national regulation, and cease to be taxable by the State of their origin."

See also *St. Louis S. W. Ry Co. vs. Arkansas*, 235 U. S. 55.

The Act provides for the assessment of the tax "as the coal is mined, washed or screened and is ready for shipment or market." The tax is therefore to be imposed before the property is started in the course of transportation from the State. This objection cannot be sustained.

110 6. The bill raises the further question that the Act is unconstitutional because it is in contravention of that portion of the Fourteenth Amendment of the Constitution of the United States, which provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

We do not understand upon what basis this contention can rest. If it means that there is a denial of due process of law, the answer is that there is the same process for the settlement of the tax and appeal therefrom, which has existed since the original Act of 1811 for the settlement of public accounts. If it be intended to argue that there is a denial of the equal protection of the laws, that argument is already answered by what we have heretofore said. If it be intended to argue that the anthracite coal in Pennsylvania is to be enjoyed by the citizens of all the state, and that therefore this is a law abridging the privileges or immunities of citizens of the United States, we see no virtue in that contention. No privilege or immunity is abridged, because no citizen of the United States outside of Pennsylvania has the right to receive property transported from Pennsylvania without such property bearing the fair share of the burden of taxation which Pennsylvania desires to impose thereon.

For these reasons we have all come to the conclusions separately filed.

WM. M. HARGEST,

P. J.

FRANK B. WICKERSHAM,

A. L. J.

JOHN E. FOX,

A. L. J.

The Prothonotary is directed to file the following decree nisi:

111

Decree.

And now, February, 1st, 1922, this cause came on to be heard on bill and answer. It appearing to the Court that the Act of May 11th, 1921, P. L. 479 entitled "An act imposing a state tax on anthracite coal; providing for the assessment and collection thereof; and providing penalties for the violation of this Act" is not in violation or contravention of either the Constitution of the United States

or the Constitution of Pennsylvania in any of the particulars charged in the bill of complain, it is hereby ordered, adjudged and decreed that the said bill of complaint be dismissed at the cost of the plaintiff.

WM. M. HARGEST,

P. J.

FRANK B. WICKERSHAM,

A. L. J.

JOHN E. FOX,

A. L. J.

112 (Endorsement:) In the Court of Common Pleas of Dauphin Count. In Equity. No. 709, Equity Docket. Roland C. Heisler, Plaintiff, vs. Thomas Colliery Company; E. Herbert Suender, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants. Opinion. Filed Feb'y 2, 1922.

113 *Plaintiff's Exceptions to Findings of Fact in Law and to Decree.*

In the Court of Common Pleas of Dauphin County, Pennsylvania.

No. 709, Equity Docket.

ROLAND C. HEISLER, Plaintiff,

vs.

THOMAS COLLIERY COMPANY, E. HERBERT SUENDER, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants.

Plaintiff's Exceptions to Findings of Fact in Law and to Decree in the Above Case.

114 The plaintiff excepts to the findings of fact and conclusions of law and decree in the above entitled case in that the learned Court erred in the following particulars:

1. In entering the decree dismissing the plaintiff's bill.
2. In the following conclusion of law in the course of the opinion filed:

"Upon the best consideration which we have been able to give to the case before us, we find that in the case of Commonwealth vs.

Alden Coal Company, *supra*, the Supreme Court declared the Act of June 27th, 1913, P. L. 639 unconstitutional, because there was nothing shown to the Court upon which a substantial difference between anthracite and bituminous coal could rest, and therefore, the classification attempted to be made was arbitrary. But, in the case before us, substantial differences have been shown and found, and we therefore conclude that it is our duty to sustain the classification made by the Act of May 11th, 1921. In coming to that conclusion, we have given full respect to the decision of the Supreme Court in the case of the Commonwealth vs. Alden Coal Company, as we understand it."

3. In holding in answer to plaintiff's fifth request for finding of fact that the tax imposed by the Act of May 11th, 1921, is not unlawful.

4. In its answer to plaintiff's eighth request for finding of fact, which request and answer are as follows:

"8. The commodity known as coal is a fuel and is found in various grades or qualities in Pennsylvania, the grades being known as anthracite, bituminous, semi-anthracite and semi-bituminous.

115 "Refused. We find that anthracite and bituminous are different kinds of coal and that semi-anthracite is a grade of anthracite, and semi-bituminous is a grade of bituminous."

5. In its answer to plaintiff's ninth request for finding of fact, which request and answer are as follows:

"9. The difference between anthracite, semi-anthracite, bituminous and semi-bituminous coal is one of degree and not of kind; it is a matter of difference in fixed carbon, volatile matter and dullness and brightness in appearance. They belong to one general class, are closely related both as to origin and use. There is as much difference between certain grades of anthracite as between some grades of anthracite and some grades of coal not called anthracite. All grades of coal, both anthracite and bituminous, are used for fuel purposes.

"Refused as stated."

6. In its answer to plaintiff's seventeenth request for finding of fact, which request and answer are as follows:

"17. Between October 2d, 1915, the date of the decision in Commonwealth vs. Alden Coal Company, 251 Pa. 134, and May 11th, 1921, the Thomas Colliery Company expended upwards of \$100,000 in constructing and adding permanent improvements to washeries and the facilities immediately connected therewith designed for the recovery and preparation from culm banks of the coal therein of which by far the greater part consists of steam sizes and pea coal which are sold in direct competition with bituminous, semi-bituminous and semi-anthracite grades of coal in the fuel market both of Pennsylvania and outside of Pennsylvania; and said Thomas Colliery Company, during said period expended upwards of \$125,000

116 in constructing and adding permanent improvements to its coal mines and collieries for the production and preparation for market of fresh mined coal, approximately 40 per centum of which consists of said pea and smaller sizes.

"Refused as immaterial."

7. In its answer to plaintiff's eighteenth request for finding of fact, which request and answer are as follows:

"18. In said period the corporations and other owners, operators and lessees of anthracite coal mines in Pennsylvania have expended upwards of \$30,000,000 in constructing and adding permanent improvements to collieries, washeries, screening plants and other buildings and structures for the purpose of producing and preparing for market said anthracite coal, a large part of which expenditure was in connection with the construction and improvement of washeries and the facilities connected therewith designed for the recovery and preparation for market of the pea and smaller sizes of coal contained in the culm banks appurtenant to such washeries.

"Refused as immaterial."

8. In its answer to plaintiff's nineteenth request for finding of fact, which request and finding are as follows:

"19. No notice was in fact ever published of the proposed introduction and enactment of the Act of May 11th, 1921, in any of the counties or localities in which anthracite coal is found.

"We find this fact because it is not specifically denied in the answer, but we regard it as immaterial."

9. In its answer to plaintiff's twentieth request for finding of fact, which request and answer are as follows:

117 "20. If the said E. Herbert Suender continues to assess daily said tax and makes the report required by said act and if the said Company and its directors, as they propose and declare their intention to do, pay without contest the tax imposed by said Act of Assembly approved May 11th, 1921, they will materially and permanently misappropriate and diminish the assets of the Company and will consequently lessen the dividends on the shares of stock and the value of the shares, and thus diminish the equity of the stockholders in said corporation; the interest of the plaintiff as a stockholder will be greatly and irreparably injured thereby, and there will be no means of redress available to him.

"Refused."

10. In its answer to plaintiff's twenty-second request for finding of fact, which request and answer are as follows:

"22. It is not alleged in the pleadings nor is it a fact that bituminous coal was not used for the manufacture of coke, gas and by-products prior to 1915.

"Refused as immaterial."

11. In its answer to plaintiff's twenty-third request for finding of fact, which request and answer are as follows:

"23. The by-products obtained from bituminous coal are all obtainable from anthracite although not at present commercially produced therefrom.

"Affirmed with the additional fact that such by-products cannot be produced from anthracite in quantities rendering such production commercially practical and none of which are produced therefrom."

12. In its answer to plaintiff's twenty-fifth request for finding of fact, which request and answer are as follows:

"25. Coke is used exclusively for fuel purposes.

"Refused. It appears in the answer that water gas and producer gas are made from coke."

13. In its answer to plaintiff's twenty-sixth request for finding of fact, which request and answer are as follows:

118 "26. The gas extracted from bituminous coal in the coking process is used for fuel.

"Refused as stated. The gas liberated in the by-products process is saved and used for fuel and illumination, but the unliberated gas enters into other by-products not used for fuel."

14. In its answer to plaintiff's twenty-seventh request for finding of fact, which request and answer are as follows:

"27. The different grades of anthracite coal vary materially in the amount of fixed carbon, and of volatile matter as well as in color, lustre and structural character, hardness, compactness, cleanness and freedom from dust, and such material variation exists between the different grades of anthracite coal and semi-anthracite and semi-bituminous.

"We find that the different grades vary in the particulars stated but there is nothing in the pleadings which justifies a finding that they vary materially or that such material variation exists between the different grades of anthracite and semi-anthracite and semi-bituminous coal."

15. In its answer to plaintiff's twenty-eighth request for finding of fact, which request and answer are as follows:

"28. The fuel ratio of anthracite coal varies materially as between the different grades, and the fuel ratio of the different grades of anthracite coal differ materially from that of semi-anthracite and semi-bituminous coal.

"We find that the fuel ratio of anthracite coal varies, but we cannot find that such fuel ratio varies materially or that such ratio differs materially from that of semi-anthracite and semi-bituminous coal."

16. In its answer to plaintiff's first request for conclusion of law, which request and answer are as follows:

119 "The Act of May 11th, 1921, is unconstitutional and void in that it offends against the First Section of Article IX of the Constitution of Pennsylvania, which provides as follows:

" 'All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.'

"Denied."

17. In its answer to plaintiff's second request for conclusion of law, which request and answer are as follows:

"2. The Act of May 11th, 1921, is unconstitutional and void in that it offends against the Eighth Section of Article III of the Constitution of Pennsylvania, which provides:

" 'No local or special bill shall be passed unless notice of the intention to apply therefor shall have been published in the locality where the matter or the thing to be affected may be situated; which notice shall be at least 20 days prior to the introduction into the General Assembly of such bill and in the manner to be provided by law; the evidence of such notice having been published shall be exhibited in the General Assembly before such act shall be passed.'

"Denied."

18. In its answer to plaintiff's third request for conclusion of law, which request and answer are as follows:

"3. The Act of May 11th, 1921, is void in that it is a local or special bill and notice of the intention to apply therefor was not published as required by the provisions of the act entitled 'An act regulating the publishing of application for local or special legislation,' approved February 12th, 1874 (P. L. 48).

"Denied."

19. In its answer to plaintiff's fourth request for conclusion of law, which request and answer are as follows:

120 "4. The Act of May 11th, 1921, is void in that its provisions are indefinite and unenforceable for the reason that it is impossible to determine from the act the exact date on or before which to file the annual report required by the provisions of the act to be filed with the Auditor General, and for the further reason that it is impossible to determine from the act when the penalties imposed thereby for neglect or failure to make said report are incurred, and for other reasons said act is indefinite and unenforceable and therefore void.

"Denied."

20. In its answer to plaintiff's fifth request for conclusion of law, which request and answer are as follows:

"5. The Act of May 11th, 1921, is unconstitutional and void because it is in contravention of Clause 5 of Section 9 of Article I of the Constitution of the United States which provides that:

"No tax or duties shall be laid on articles exported from the State."

"This constitutional provision is violated for the reason that the larger part of anthracite coal is exported from the State.

"Denied."

21. In its answer to plaintiff's sixth request for conclusion of law, which request and answer are as follows:

"6. The Act of May 11th, 1921, is unconstitutional and void for the reason that it is in violation of Clause 3 of Section 8 of Article I of the Constitution of the United States, which provides that:

"Congress shall have the power to regulate commerce with foreign nations and among the several States and with the Indian Territories."

"This provision of the Constitution of the United States is violated for the reason that the larger part of the production of anthracite coal is used in interstate commerce among the several States and foreign nations, and it is beyond the power of the Legislature of Pennsylvania to interfere with such interstate commerce by imposing an arbitrary, unjust and unreasonable tonnage tax on an article of interstate commerce.

"Denied."

22. In its answer to plaintiff's seventh request for conclusion of law, which request and answer are as follows:

"7. The Act of May 11th, 1921, is unconstitutional and void for the reason that it is in contravention of that portion of the Fourteenth Amendment of the Constitution of the United States, which reads as follows:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law or deny to any person within its jurisdiction the equal protection of the laws."

"The deposits of anthracite coal in Pennsylvania are to be enjoyed by the citizens of all the States.

"Denied."

23. In its answer to plaintiff's eighth request for conclusion of law, which request and answer are as follows:

"8. It not appearing from the pleadings nor from the Court's knowledge of the facts that there has been any material change in the characteristics and uses of bituminous and anthracite coal since

1915, no reason appears for a reversal of the decisions by the Supreme Court of Pennsylvania in *Commonwealth vs. Alden Coal Co.*, 251 Pa. 134, and *Commonwealth vs. St. Clair Coal Co.*, 251 Pa. 159.

"Denied."

24. In affirming defendants' third request for finding of fact, the fact therein stated being immaterial, which said request and answer are as follows:

122 "3. The total quantity of anthracite coal produced in Pennsylvania is about one hundred and sixty-three times the quantity of semi-anthracite coal produced in Pennsylvania.

"Affirmed."

25. In affirming defendants' fourth request for finding of fact, the fact therein stated being immaterial, which said request and answer are as follows:

"4. The quantity of semi-bituminous coal produced in Pennsylvania is very small compared with the total amount of bituminous coal produced in Pennsylvania.

"Affirmed."

26. In affirming defendants' fifth request for finding of fact, the said request and the answer of the Court thereto being as follows:

"5. Anthracite coal differs from bituminous coal in the following physical properties: the amount of fixed carbon, the amount of volatile matter, color, lustre and structural character. The percentage of fixed carbon in anthracite coal is much higher, and the percentage of volatile matter is much lower than in bituminous coal. Anthracite coal is hard, compact and comparatively clean and free from dust and is commonly termed 'hard coal,' while bituminous coal is very much less hard, and is dusty and dirty and is commonly termed 'soft coal.'

"Affirmed."

27. In affirming defendants' sixth request for finding of fact, the fact therein stated being immaterial, which said request and the answer of the Court thereto are as follows:

"6. The fuel ratio (ascertained by dividing the percentage of fixed carbon by the percentage of volatile matter) of bituminous coal differs from that of anthracite coal and as the fuel ratio of bituminous coal rises the coal is more soft, and as the fuel ratio of
123 anthracite coal rises the coal is more hard.

"Affirmed."

28. In affirming the first paragraph of defendants' seventh request for finding of fact, the said request and the answer of the Court thereto being as follows:

"7. Substantially all anthracite coal is used for fuel only, but bituminous coal is used not only for fuel but as a raw material from which a great number and variety of commercial products are manufactured.

"Except as to structure, the general difference in physical properties between bituminous and anthracite coal is the same as the difference between bituminous coal and coke, a product which is manufactured from bituminous coal.

"Affirmed."

29. In affirming defendants' eighth request for finding of fact, the fact therein stated being immaterial, which said request and the answer of the Court thereto are as follows:

"8. No county in Pennsylvania produces both anthracite and bituminous coal. Wherever one is present in Pennsylvania the other is absent.

"Affirmed."

30. In affirming the defendants' ninth request for finding of fact, the fact therein stated being immaterial, which said request and the answer of the Court thereto are as follows:

"9. Both bituminous and anthracite were originally deposits of vegetable matter and have been brought to their present forms by processes of nature. According to the commonly accepted theory anthracite, however, has been subjected to a process which has not been applied to bituminous, whereby, through the application of heat, a large proportion of the volatile matter has been removed, as it is removed from bituminous coal in the manufacture of coke.

"Affirmed."

124 31. In affirming defendants' twelfth request for finding of fact, the fact therein stated being immaterial, which said request and the answer of the Court thereto are as follows:

"12. Sixty-one per cent. of anthracite coal produced in Pennsylvania is used for domestic purposes and substantially all anthracite coal is used for fuel in the production of heat for domestic purposes and of steam for domestic purposes and for power.

"Affirmed."

32. In affirming defendants' thirteenth request for finding of fact, the fact therein stated being immaterial, which said request and the answer of the Court thereto are as follows:

"13. A small percentage of anthracite produced in Pennsylvania is used in the production of gasees, known as water-gas and producer-gas. Said gasees, which are also produced from coke, are of a different character from that produced from bituminous coal. The gas produced from bituminous coal, known as coal gas, is produced

from the volatile matter in said coal, while the said gasses produced from anthracite are obtained by mixing the carbon of the coal combined with oxygen, in the form of CO , with nitrogen from the air, to obtain producer-gas, or with hydrogen from super-heated water vapor, to obtain water-gas.

"Affirmed."

33. In affirming defendants' fourteenth request for finding of fact, the fact therein stated being immaterial, which said request and the answer of the Court thereto are as follows:

"14. Bituminous coal is divided into two types—caking and non-caking or splint coal, that is, coals that will intumesce or run together in burning and those which do not run together but remain separate like blocks of wood. Practically all (at least 99 per cent.) of the bituminous coal produced in Pennsylvania is of the caking type. This caking property is the foundation of the coking industry. While practically all of the bituminous coal of Pennsylvania is caking coal as aforesaid, not all of it will make commercially acceptable coke because of the percentage of phosphorus or sulphur. Methods of eliminating these impurities are being developed, whereby the percentage of the Pennsylvania bituminous coal available for the manufacture of marketable coke is increasing. Recent experiments in by-product ovens indicate that practically all the bituminous coal in Pennsylvania will be available for the manufacture of marketable coke when the elimination of high sulphur and high phosphorus has been accomplished.

"Affirmed."

34. In affirming defendants' fifteenth request for finding of fact, the fact therein stated being immaterial, which said request and the answer of the Court thereto are as follows:

"15. In the year 1918 more than one quarter of the bituminous coal produced in Pennsylvania was used in the manufacture of coke. Later statistics are not available. Of the coal so used, approximately 72 per cent. was manufactured into coke by the 'beehive oven process' and approximately 28 per cent. by the 'by-product process.' The said beehive process is the old fashioned process and is being rapidly replaced by the by-product process. The said by-product process is usually operated near the place of consumption of the coke, with coal purchased from more than one source, and about one-half the coal produced in Pennsylvania and used in said process in 1918 was so used at points outside the State. Each process eliminates from the coal a large percentage of the volatile matter for the purpose of producing the coke. In the beehive process the volatile matter so extracted is dissipated in the atmosphere and lost, while in the by-product process the gas liberated is saved and used for fuel and illumination and, with some resultant chemical changes and by distillation and condensation, volatile matter is recovered in the form of tar or pitch, ammonia (used largely in the manufacture of

fertilizers) cyanide and benzol and other oils used to generate power by internal combustion and for other purposes.

"Affirmed."

35. In affirming defendants' sixte-nth request for finding of fact, the fact therein stated being immaterial, which said request and the answer of the Court thereto are as follows:

"16. Much of the tar or pitch so recovered is used, among other purposes, in materials, for the surfacing of highways, the State Highway Department of Pennsylvania using annually from 3,000,000 to 6,000,000 gallons of such tar or pitch for such purpose.

"Affirmed."

86. In affirming defendants' sevente-nth request for finding of fact, the fact therein stated being immaterial, which said request and the answer of the Court thereto are as follows:

"17. From said tar or pitch there are extracted by various processes certain products which, though it is possible to extract them from anthracite, cannot be produced therefrom in quantities rendering such production commercially practicable and none of which are in practice produced therefrom. Said products include:

"Saccharine, a substitute for sugar; Lampblack; Dyes; Sulphur Compounds; Indigo; Carbolie acid and other antiseptics and germicides; Explosives, including picric acid, 'T. N. T.' etc.; Flavoring materials; Hydroquinine, for photographic development; 127 Paints; Cleansing compounds and paint removers; Chloride; Creosote; Perfumery; and hundreds of medicinal and other products in common use.

"Affirmed."

37. In affirming defendants' eighteenth request for finding of fact, the fact therein stated being immaterial and not being in accordance with present scientific knowledge, which said request and the answer of the Court thereto are as follows:

"18. Coke cannot be made from anthracite coal.

"Affirmed."

38. In affirming defendants' nineteenth request for finding of fact, the fact therein stated being immaterial, which said request and the answer of the Court thereto are as follows:

"19. For the year 1917, the latest figures available, approximately thirty-five per cent of the coal used in the said by-product process in the United States, and more than half of that used in the beehive process was produced in Pennsylvania. In the year 1918 the quantities produced and the prices of the quantities sold of certain of the by-products obtained in the said by-product process operations in the

United States were as follows: tar, 263,299,470 gallons; \$6,364,972 ammonia, 510,618,293 pounds, \$26,442,951; gas, 385,035,154,000 cubic feet, \$13,699,515; benzol, products, 145,405,811 gallons, \$25,688,446; naphthaline, 16,087,498 pounds, \$650,229; other products, \$1,756,345; total \$74,602,458.

"Affirmed."

39. In affirming defendants' twentieth request for finding of fact, the fact therein stated being immaterial, which said request and the answer of the Court thereto being as follows:

"20. In 1918 the total production of coke in the United States was about 56,000,000 tons of a value of about \$382,000,000
128 at the ovens, and of said total production about forty-seven per cent was produced in Pennsylvania.

"Affirmed."

40. In affirming defendants' twenty-first request for finding of fact, the fact therein stated being immaterial, which said request and the answer of the Court thereto are as follows:

"21. A large amount of bituminous coal produced in Pennsylvania is used in the production of gas for fuel and illumination in addition to the gas produced in connection with the manufacture of coke as aforesaid.

"Affirmed."

41. In affirming defendants' twenty-second request for finding of fact, the fact therein stated being immaterial, which said request and the answer of the Court thereto are as follows:

"22. The railroads of Pennsylvania, in their commodities classification, place coal in two classes—bituminous and anthracite. Anthracite is subclassified into at least three classes: (a) domestic sizes (larger than pea coal); (b) pea coal; (c) smaller than pea coal; all carrying different freight rates.

"Affirmed. We cannot say that it is not material in determining the classification for the purpose of taxation."

42. In affirming defendants' twenty-third request for finding of fact, the fact therein stated being immaterial, which said request and the answer of the Court thereto are as follows:

"23. The Congress of the United States, in levying import taxes, has placed bituminous and anthracite coal in separate classes in the following instances:

129 "(a) The Act of March 2d, 1861 (12 Stat. L. 178, 182) placed a tax of \$1 per ton on bituminous coal and a tax of 50 cents per ton on all other coal.

"(b) The Act of June 30th, 1864 (13 Stat. L. 202, 206), placed a tax of \$1.25 a ton on bituminous coal and shale and a tax of 40 cents per ton on all other coal.

"(c) The Act of July 14th, 1870 (16 Stat. L. 256, 266), passed to remove certain commodities from the taxable list to the free list, enumerates anthracite coal as one of said commodities.

"(d) In the Act of March 3, 1883 (22 Stat. L. 488, 511), a tax of 75 cents per ton is laid on bituminous coal and anthracite is named on the free list.

"(e) In the Act of October 1st, 1890 (26 Stat. L. 567, 600), a tax of 75 cents per ton is laid on bituminous coal and anthracite coal is named on the free list.

"(f) In the Act of August 27th, 1894 (28 Stat. L. 509, 533), a tax of 40 cents per ton is laid on bituminous coal and anthracite coal is named on the free list.

"(g) In the Act of July 24th, 1897 (30 Stat. L. 151, 190), a tax of 67 cents per ton is laid on bituminous coal and all coal containing less than 92 per cent of fixed carbon and anthracite coal, not specially provided for in the Act, is named on the free list.

"(h) In the Act of August 5th, 1909 (36 Stat. L. Part One, 11, 65), a tax of 45 cents per ton is laid on bituminous coal and anthracite coal is named on the free list.

"The present Tariff Act of 1913 places all coal on the free list.

"Affirmed for the reason given in making the twenty-second finding."

43. In affirming defendants' twenty-fourth request for finding of fact, the fact therein stated being immaterial, which said request and the answer of the Court thereto are as follows:

"24. The Canadian Parliament, in levying import taxes, has placed bituminous and anthracite coal in separate classes in the following instances:

130 (a) In Vol. I of the Revised Statutes of Canada, 1886, Chapter 33, page 373, a tax of 50 cents per ton of 2,000 pounds was placed on anthracite coal and a tax of 60 cents per ton of 2,000 pounds was placed on bituminous coal.

"(b) By the Act of June 23d, 1887, page 130 (Chapter 39), anthracite coal was placed on the free list, the duty on bituminous coal being retained.

(c) By the Act of July 23d, 1894, a tax of 60 cents per ton of 2,000 pounds was placed on bituminous coal and anthracite coal was placed on the free list.

(d) By the Act of June 29th, 1897, pages 85 and 101, rates of taxation, dependent upon the sizes, were placed upon bituminous coal and anthracite coal was placed on the free list.

"Affirmed for the reason given in making the twenty-second finding."

44. In affirming defendants' twenty-fifth request for finding of fact, the facts therein stated being immaterial, which said request and the answer of the Court thereto are as follows:

"25. By Act approved May 18th, 1878, P. L. 67, the standard weight of bituminous coal in this Commonwealth is fixed at seventy-six pounds to the bushel and 2,000 pounds to the ton, penalties being imposed upon persons engaged in the mining of bituminous coal who shall fix any other standard. By Act approved June 26th, 1895, P. L. 334, the weight of 2,240 pounds avoirdupois is made to constitute the legal ton of anthracite coal in the Commonwealth in all transactions between retail dealers and their customers.

"Affirmed."

45. In affirming defendants' twenty-sixth request for finding of fact, the fact therein stated being immaterial, which said request and the answer of the Court thereto are as follows:

"26. The price of anthracite on cars at the mine is ordinarily much larger than the price of bituminous coal on cars at the mine, the difference resulting largely from differences in rates of royalty and cost of production and preparation for market.

"Affirmed."

46. In affirming defendants' twenty-seventh request for finding of fact, the fact therein stated being immaterial, which said request and the answer of the Court thereto are as follows:

"27. The State of Pennsylvania has enacted two separate and distinct laws regulating the mining of coal, to wit: The Act of June 2d, 1891, P. L. 176, and its supplements regulating only the mining and preparation of anthracite, and the Act of June 9th, 1911, P. L. 756, and its supplements applying only to the mining of bituminous coal.

"Affirmed."

47. In affirming defendants' twenty-eighth request for finding of fact, the fact therein stated being incorrect and not based on an averment in the record, which said request and the answer of the Court thereto are as follows:

"28. Anthracite coal and bituminous coal are two distinctly different commodities and are recognized as such in the commercial world and by the public generally.

"Affirmed."

48. In affirming defendants' twenty-ninth request for finding of fact, the fact therein stated being immaterial and incorrect, which said request and the answer of the Court thereto are as follows:

132 "29. In addition to coke and gas used for fuel and illumination, there is extracted from bituminous coal a large number of commercial products not used or usable for fuel purposes.

"Affirmed."

49. In affirming defendants' first request for conclusion of law, which request and the answer of the Court are as follows:

"1. The Act of General Assembly No. 225 approved May 11th, 1921, entitled 'An Act imposing a State tax on anthracite coal, providing for the assessment and collection thereof, and providing penalties for violation of this Act,' is not in violation of any provision of the Constitution of Pennsylvania or of the Constitution of the United States.

"Affirmed."

50. In affirming defendants' second request for conclusion of law, which request and the answer of the Court are as follows:

"2. The Act of May 11th, 1921, is not in violation of Section 1 of Article IX of the Constitution of Pennsylvania.

"Affirmed."

51. In affirming defendants' third request for conclusion of law, which request and the answer of the Court are as follows:

"3. The Act of May 11th, 1921, is not in violation of Section 8 of Article III of the Constitution of Pennsylvania.

"Affirmed."

52. In affirming defendants' fourth request for conclusion of law, which request and the answer of the Court are as follows:

133 "4. The Act of May 11th, 1921, is not in violation of Clause 5, Section 9, Article I, of the Constitution of the United States.

"Affirmed."

53. In affirming defendants' fifth request for conclusion of law, which request and the answer of the Court are as follows:

"5. The Act of May 11th, 1921, is not in violation of Clause 3, Section 8, Article I, of the Constitution of the United States."

"Affirmed."

54. In affirming defendants' sixth request for conclusion of law, which request and the answer of the Court are as follows:

"6. The Act of May 11th, 1921, is not in violation of the Fourteenth Amendment of the Constitution of the United States.

"Affirmed."

55. In affirming defendants' seventh request for conclusion of law, which request and the answer of the Court are as follows:

"7. The plaintiff is not entitled to the relief prayed for in his bill.

"Affirmed."

REESE H. HARRIS,
H. S. DRINKER, JR.,
WM. S. JENNEY,
F. W. WHEATON,

For Pj.

134 (Endorsement:) Court of Common Pleas of Dauphin County. No. 709, Equity Docket. Roland C. Heisler, Plaintiff, vs. Thomas Colliery Company; E. Herbert Suender, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company, Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants. Plaintiff's Exceptions to Findings of Fact in Law and to Decree in the above case. Filed Feby. 13, 1922. Reese H. Harris, Henry S. Drinker, Jr., William S. Jenney, Frank W. Wheaton, Attorneys for Plaintiff.

135 *Defendants' Exceptions to Findings of Fact Made by the Court.*

In the Court of Common Pleas of Dauphin County, Pennsylvania,
Sitting in Equity.

No. 709, Equity Docket, 1921.

Between

ROLAND C. HEISLER, Plaintiff,

and

THOMAS COLLIERY COMPANY, E. HERBERT SUENDER, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants.

Defendants' Exceptions to Findings of Fact Made by the Court.

The defendants except to the findings of fact made by the Court in the above entitled case, for the reason that the Court erred in the answer made to the Plaintiff's nineteenth (19th) request for finding of fact; which request and the answer of the Court thereto, were as follows:

136 "19. No notice was in fact ever published of the proposed introduction and enactment of the Act of May 11, 1921, in any of the counties or localities in which anthracite coal is found.

"Answer: We find this fact because it is not specifically denied in the answer, but we regard it as immaterial."

GEO. ROSS HULL,
Deputy Attorney General.

EMERSON COLLINS,
Deputy Attorney General.

ROBERT S. GAWTHROP,
First Deputy Attorney General.

GEO. E. ALTER,
Attorney General.

137 (Endorsement:) In the Court of Common Pleas of Dauphin County, Pennsylvania, Sitting in Equity. No. 709. Equity Docket, 1921. Between Roland C. Heisler, Plaintiff, and Thomas Colliery Company; E. Herbert Suender, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Norris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor

General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants. Filed Feb'y 14, 1922. Defendants' Exceptions to Findings of Fact made by the Court. George Ross Hull, Emerson Collins, Deputy Attorneys General; Robert S. Gawthrop, First Deputy Attorney General; George E. Alter, Attorney General, Solicitors for Defendants.

138

Final Decree.

Now, February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for Findings of Fact is modified so as to read as follows: "We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused."

In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff.

And now, February 15th, 1922, an exception to the Decree is allowed to the plaintiff and a bill sealed.

By the Court.

WM. M. HARGEST, [SEAL.]
P. J.

139 (Endorsement:) Common Pleas of Dauphin Co., Sitting in Equity. 709 Equity Docket. Between Roland C. Heisler, Plaintiff, and Thomas Colliery Company; E. Herbert Suender, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company, Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants. Final Decree. Filed Feb'y 15, 1922.

140 In the Court of Common Pleas for the County of Dauphin,
State of Pennsylvania, — Term, 19—.

No. 709, Equity Docket.

ROLAND C. HEISLER, Plaintiff,

and

THOMAS COLLIERY COMPANY, E. HERBERT SUENDER, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania.

Appeal of Plaintiff from the Decree of Said Court, Sitting in Equity.

Know all men by these presents, That we, Roland C. Heisler and American Surety Company of New York are held and firmly bound unto the Commonwealth of Pennsylvania, to the use of all parties interested, in the sum of Five Hundred dollars, lawful money of the United States, to be paid to the said Commonwealth, to the use of the party or parties entitled thereto or their certain executors, administrators or assigns, being double the amount of said order, judgment or decree and all costs accrued and likely to accrue, to which payment, well and truly to be made and done, we do bind ourselves, our heirs, executors and administrators, and every of them, firmly by these presents.

Sealed with our seals and dated this 27th day of February A. D. 1922.

Whereas, Roland C. Heisler, plaintiff has appealed to the Supreme Court of Pennsylvania from the decree of the Court of Common Pleas of the County of Dauphin in the above stated suit or proceeding. Now the condition of this obligation is such, That if the said Appellant will prosecute this Appeal with effect, and will pay all costs and damages awarded by the Appellate Court or legally chargeable against him, then this obligation to be void; otherwise to remain in full force and virtue.

[Seal of American Surety Company of New York.]

ROLAND C. HEISLER,

[L. s.]

[L. s.]

AMERICAN SURETY COMPANY OF
NEW YORK,

By CARL B. WEED,
CARL B. WEED,

Resident Vice President.

Signed, Sealed and delivered in the presence of

M. KEARNEY,

E. C. RIEBEN,

As to Surety.

Attest:

M. E. NEVILLE.

M. E. NEVILLE,

Resident Assistant Secretary.

663,458A.

141 (Endorsement:) No. 709, — Term, 191-. Equi
Docket. Roland C. Heisler, Plaintiff, and Thomas Collier
Company et al. Bond. Filed — —, 191-. Bond on Appeal
the Supreme Court of Penn'a.

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Form G 362 1-22.

Cut of building.

Company's Home Office Building.

American Surety Company of New York.

Incorporated April 14, 1884.

General Offices, 100 Broadway.

Financial Statement, Dec. 31, 1921.

Resources.

Real Estate:

Home Office Premises, un-

encumbered \$4,050,000.00

New Building Construction.. 4,180,535.61

\$8,230,535.61

Securities at Market Value:

Stocks \$751,500.00

Bonds 4,081,514.48

4,833,014.48

Cash in Banks and Offices.....

448,234.37

Excise Reinsuring Fund.....

2,258.53

Premiums in Course of Collection.....

1,603,967.88

Accrued Interest and Rents.....

133,988.91

Reinsurance Receivable.....

47,289.64

\$15,299,289.42

Liabilities.

Capital Stock	\$5,000,000.00
Surplus and Undivided Profits.....	1,714,960.53
Reserve for Unearned Premiums.....	4,828,288.34
Reserve for Outstanding Premiums.....	473,516.99
Reserve for Contingent Claims.....	2,581,044.17
Reserve for Expenses and Taxes.....	580,574.64
Reinsurance & Other Accounts Payable.....	120,904.75
	<hr/>
	\$15,299,289.42

(Endorsement.)

STATE OF NEW YORK,

County of New York, ss:

H. E. Ising being duly sworn, says: That he is an Assistant Secretary of the American Surety Company of New York; that said Company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said Company, and is duly qualified to act as surety under such laws; that said Company has also duly complied with and is duly qualified to act as surety under the Act of Congress of August 13, 1894, entitled "An Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon," as amended; that the within is a true copy of the last statement of the assets and liabilities of said Company as rendered pursuant to section 4 of said Act of Congress; that said statement is true and that said American Surety Company of New York is worth more than \$5,000,000 over and above all its debts and liabilities and such exemptions as may be allowed by law.

H. E. ISING.

Subscribed and sworn before me this 16th day of Feb. 1922.

[Notarial Seal.]

H. P. KRIEGSMAN.

H. P. KRIEGSMAN,

Notary Public, Bronx County, No. 41.

Register's No. 20.

Certificate filed in New York County No. 89.

Register's No. 3096, Kings County No. 11.

Register's No. 3061, Queens County No. 236.

Certificate filed in Richmond and Westchester Counties.

Term expires March 30, 1923.

Authority of Signers for Surety.

Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.

The first meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 17, 1922, at twelve o'clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees, American Surety Company of New York.

"GENTLEMEN:

"The Committee appointed by the Executive Committee of this Company, at their meeting held Tuesday, November 29, 1921, for the purpose of nominating * * * Officers of the Company, * * * for the ensuing year and until their successors are elected, beg leave to report as follows:

"We nominate for * * *

Place.	Resident vice-presidents.	Resident assistant secretaries.
Philadelphia, Pa.	Samuel S. Sharp. Robert R. Benedict. Carl B. Weed. Jos. A. Mackle. Foster Hale. Robert T. Rouse.	Robert R. Benedict. M. E. Neville. A. C. Robinson. Carl B. Weed. Jos. A. Mackle. Foster Hale. Frank L. Mueller. H. K. Budd. Faller Spreeman. Robert T. Rouse. E. C. Rieben.

* * * * *

"Whereupon, it was

"Resolved, That the Secretary be authorized to cast one ballot on behalf of the Trustees present, for the members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected.

to their respective offices for the ensuing year and until their successors are elected.

"The following resolution was adopted:

"Resolved, That the Resident Vice Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by a Resident Assistant Secretary."

* * * * *

146 STATE OF NEW YORK,
County of New York, ss:

I, W. H. Riley, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 19th day of January, 1922.

[Seal of American Surety Company of New York.]

W. H. RILEY,
Assistant Secretary.

147 American Surety Company of New York.

R. R. Benedict, Resident Vice President.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

On the 27th day of Feb. 1922, before me, M. Elva Neville, the subscriber, a Notary Public for the Commonwealth of Pennsylvania, residing in the City of Philadelphia, personally appeared R. R. Benedict, who being duly sworn doth depose and say that he is the Resident Vice President of the American Surety Company of New York, a corporation created by and existing under the laws of the State of New York, and accepted as Surety by the Courts of that State, with offices in the West End Trust Building, Southwest corner of Broad Street and South Penn Square in the City of Philadelphia. The amount of Capital stock of said American Surety Company of New York paid in cash is \$5,000,000.00, divided into 100,000

shares, all of which have been issued at a par value of \$50.00 each. The last sale of stock of said Company was Dec. 21, 1921 at which time 150 shares on a basis of \$50 per share were sold at \$134 or \$67 per share.

The total amount for which the American Surety Company of New York was liable as surety on Dec. 31, 1921 was \$1,910,506.690.00.

The above affidavit is given in compliance with Rules 35-39, adopted by the Board of Judges of the Courts of Common Pleas of Philadelphia County, for regulating the approval of corporations as Surety in judicial proceedings.

R. R. BENEDICT.

Sworn and subscribed before me the day and year aforesaid.
[Notarial Seal.]

M. ELVA NEVILLE,
Notary Public.

Commission Expires February 26th, 1925.
200 West End Trust Bldg., Philadelphia, Pa.

The statement of the condition of the American Surety Company of New York at the close of business, March 31, 1921, is as follows:

Real Estate:	Resources.	
Home Office Premises, unencumbered	\$4,500.00	
New Building Construction ...	2,653,029.37	
		\$7,153,029.37
Securities at Market Value:		
Stocks	872,250.00	
Bonds	4,270,504.70	
Short Term Securities	16,787.50	
		5,159,542.20
Cash in Banks and Offices		655,318.49
Excise Reinsuring Fund		36,812.09
Premiums in Course of Collection		1,864,970.40
Accrued Interest and Rents		90,189.53
Accounts Receivable		55,178.59
149		\$15,015,040.72
	Liabilities.	
Capital Stock		\$5,000,000.00
Surplus and Undivided Profits		1,559,984.15
Reserve for Unearned Premiums ...		4,783,095.37
Reserve for Outstanding Premiums		448,654.49
Reserve for Refunds		11,000.00
Reserve for Contingent Claims		2,234,714.49
Reserve for Expenses and Taxes		843,531.69
Reinsurance & other Accounts Payable		134,060.53
		\$15,015,040.72

It is stipulated and agreed, as set forth in the application for approval of the American Surety Company of New York, that all moneys and securities received by said Company from any person or persons, as indemnity for suretyship, will be kept in a separate and earmarked account; and that the funds of any estate deposited with said Company or over which said Company assumes control, will not be removed from the jurisdiction of the Court.

Sussex D. Davis, Esq., and Phillippus W. Miller, Esq., the Auditors appointed by the Board of Judges, reported the following:

Findings.

First. That the American Surety Company has a full
 paid, unimpaired capital of \$5,000,000.00
 and a Surplus 1,559,984.15
 \$6,559,984.15

150 Second. That it may be accepted as sole surety by your Honorable Courts with safety in any case in which the principal sum or amount in controversy for which security is to be entered shall not be greater than \$655,998.41, being 10% of the Company's combined capital and surplus.

Respectfully submitted,

(Signed)

SUSSEX D. DAVIS,

(Signed)

PHILLIPPUS W. MILLER,

Auditors.

April 27, 1921.

The above application for approval as Surety is made by the American Surety Company of New York in accordance with Rules No. 35-39 adopted by the Board of Judges of the Courts of Common Pleas of Philadelphia County.

AMERICAN SURETY COMPANY OF
 NEW YORK.

R. R. BENEDICT,

Resident Vice President.

151 (Endorsement:) 709, Equity Dk. C. P., —, Term,
 19—. — — —. Application for Approval of Surety.
 Filed Feby. 28, 1922. Surety for — — —. Amt. of Bond —.
 American Surety Company of New York is approved as surety in
 above Feby. 28, 1922. The security of the within bond approved.
 By Abram L. Etter, Prothonotary.

152

Writ of Certiorari.

MIDDLE DISTRICT OF PENNSYLVANIA, ss:

[SEAL.]

The Commonwealth of Pennsylvania to the Justices of the Court of Common Pleas for the County of Dauphin, Greeting:

We being willing, for certain causes, to be certified of the appeal of Roland C. Heisler from the decree of said Court in the case wherein the said Appellant is Plaintiff and Thomas Colliery Company; E. Herbert Suender, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania; and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants, to No. 709, Equity Docket, Sitting in Equity before you or some of you depending, do command you, that the record and proceedings aforesaid, with all things touching the same, before the Justices of our Supreme Court, at a Supreme Court to be holden at Harrisburg, in and for the Middle District of said Commonwealth, on the twenty-first Monday of the year, 1922, being the first Monday of the Term, so full and entire as in our Court before you they remain, you certify and send together with this writ; that we may further cause to be done thereupon, what of right and according to our laws of the said State ought.

Witness, the Honorable Robert von Moschzisker, Doctor of Laws, Chief Justice of our Supreme Court, at Harrisburg, the 17th day of February, in the year of our Lord, one thousand nine hundred and twenty-two, and of the Commonwealth the 146th.

HOMER HUMMEL STRICKLER,
Deputy Prothonotary.

153 The Record and process, with all things touching the same, so full and entire as before us, they remain to the Honorable the Judges of the Supreme Court of the Commonwealth of Pennsylvania, sitting in and for the Middle District, we certify and send as within we are commanded.

WM. M. HARGEST, [L. s.]
P. J.

(Endorsement:) 709, Eq. Dk. No. 15, May Term, 1922. Supreme Court, Middle District. Roland C. Heisler, Appellant, vs. Thomas Colliery Company et al. Certiorari. To the Court of Common Pleas for the County of Dauphin. Returnable the twenty-first Monday of the year, 1922. "Rule on the appellee to answer and plead on the return day of the writ." Homer Hummel Strickler, Deputy Prothonotary. N. B.—20 days' notice to the parties or

their Counsel below necessary to compel an appearance. Filed Feby. 20, 1922. Costs \$12, pd. by Henry S. Drinker, Jr., Esq. Filed in Supreme Court, Middle District, Apr. 11, 1922.

154

Appeal and Affidavit.

In the Supreme Court of Pennsylvania for the Middle District.
Court of Common Pleas of the County of Dauphin, Sitting in Equity.

No. 709, Equity Docket.

Between

ROLAND C. HEISLER, Plaintiff,

and

THOMAS COLLIERY COMPANY, E. HERBERT SUENDER, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants.

Enter Appeal on behalf of Roland C. Heisler from the decree of the Court of Common Pleas of the county of Dauphin, Sitting in Equity.

To William Pearson, Proth'y Sup. Ct. Middle District.

HENRY S. DRINKER, JR.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Roland C. Heisler, being duly sworn, saith that the above Appeal is not intended for delay, but because he firmly believes that he has suffered injustice by the decree from which he desires to appeal.

ROLAND C. HEISLER.

Sworn and subscribed before me this 16th day of February, A. D. 1922.

[Notarial Seal.]

ELEANOR L. JAQUETTE,
Notary Public.

Commission Expires Feby. 21, 1923.

155 (Endorsement:) No. 15, May Term, 1922. Supreme Court of Pennsylvania, Middle District. Appeal and Affidavit. Roland C. Heisler, Plaintiff, v. Thomas Colliery Company et al. Filed in Supreme Court, Middle District, Feb. 17, 1922.

156

Certificate of Transfer.

In the Supreme Court of Pennsylvania in and for the Middle District, May Term, 1922.

No. 15.

ROLAND C. HEISLER, Appellant,

VS.

THOMAS COLLIERY COMPANY, E. HERBERT SUENDER, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania.

Appeal from the Court of Common Pleas for the County of Dauphin, Sitting in Equity.

No. 709, Equity Docket.

Feb. 17, 1922. Appeal and affidavit filed.

" " " Eo die exit writ rtble. 21st Monday of the year 1922.

Mar. 23, " Case verbally advanced by Mr. Chief Justice von Moschizaker to be heard in Philadelphia on Monday, April 17, 1922.

Henry S. Drinker, Jr., Esq., 750 Bullitt Bldg., Philadelphia, Pa., for Appellant.

Hon. George E. Alter, Attorney General, Harrisburg, Pa.,

Hon. Geo. Ross Hull, Deputy Attorney General, " " For Appellees.

True copy from the record.

In testimony whereof, I have hereunto set my hand and the seal of said Court, at Harrisburg this 27th day of March, A. D., 1922.

[SEAL.]

HOMER HUMMEL STRICKLER,
Deputy Prothonotary.

157 (Endorsement:) No. 15, May Term, 1922. Supreme Court. Roland C. Heisler, Appellant, vs. Thomas Colliery Company et al. Certificate of Transfer. Filed in Supreme Court, Philadelphia, Mar. 28, 1922.

158

Assignments of Error.

In the Supreme Court of Pennsylvania for the Middle District,
May Term, 1922.

15.

ROLAND C. HEISLER, Appellant,

v.

THOMAS COLLIERY COMPANY, E. HERBERT SUENDER, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurence Butler, Horatio H. Morris, Robert C. Hil, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania.

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VIII. Assignments of Error.

First. The learned Court erred in dismissing the first exception of appellant to the decree of the trial Court dismissing the plaintiff's bill, which decree, exception and ruling of the Court are as follows—

Decree.—“And now, February 1st, 1922, this cause came on to be heard on bill and answer. It appearing to the Court that the Act of May 11th, 1921, P. L. 479 entitled ‘an act imposing a State Tax on anthracite coal, providing for the assessment and collection thereof; and providing penalties for the violation of this Act,’ is not in violation or contravention of either the Constitution of the United States or the Constitution of Pennsylvania in any of the particulars charged in the bill of complaint. It is hereby ordered, adjudged and decreed that the bill of complaint be dismissed at the cost of the plaintiff.” (See Paper Book, page 47.)

Exception.—“The plaintiff excepts to the findings of fact and conclusions of law and decree in the above-entitled case in that the learned Court erred in the following particulars:

“1. In entering the decree dismissing the plaintiff's bill.” (See Paper Book, page 48.)

Ruling of the Court.—“February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: ‘We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.’

“In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff.” (See Paper Book, page 68.)

160

Second. The learned Court erred in dismissing the fourth exception of appellant to the refusal by the trial Court to affirm the eighth request of the plaintiff for finding of fact, which request, answer of the trial Court, exception and ruling of the Court are as follows—

Request.—“8. The commodity known as coal is a fuel and is found in various grades and qualities in Pennsylvania, the grades being known as anthracite, bituminous, semi-anthracite and semi-bituminous.” (See Paper Book, page 11.)

Answer of the trial Court.—“Refused. We find that anthracite and bituminous are different kinds of coal and that semi-anthracite is a grade of anthracite and semi-bituminous is a grade of bituminous.” (See Paper Book, page 11.)

Exception.—“The plaintiff excepts to the findings of fact and conclusions of law and decree in the above-entitled case in that the learned Court erred in the following particulars:

“4. In its answer to plaintiff's eighth request for finding of fact which request and answer are as follows:

“8. The commodity known as coal is a fuel and is found in various grades and qualities in Pennsylvania, the grades being known as anthracite, bituminous, semi-anthracite and semi-bituminous.

“Refused. We find that anthracite and bituminous are different kinds of coal and that semi-anthracite is a grade of anthracite and semi-bituminous is a grade of bituminous.” (See Paper Book, page 48.)

Ruling of the Court.—“February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of

February, 1922, and argument thereon having been heard

161 it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: ‘We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.’

“In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff.”

Third. The learned Court erred in dismissing the fifth exception of appellant to the refusal by the trial Court to affirm the ninth request of the plaintiff for finding of fact, which request, answer of the trial Court, exception and ruling of the Court are as follows—

Request.—“The difference between anthracite, semi-anthracite, bituminous and semi-bituminous coal is one of degree and not of kind; it is a matter of difference in fixed carbon, volatile matter and dullness and brightness in appearance. They belong to one general class, are closely related both as to origin and use. There is as much difference between certain grades of anthracite as between some grades of anthracite and some grades of coal not called anthracite. All grades of coal, both anthracite and bituminous, are used for fuel purposes.” (See Paper Book, pages 11-12.)

Answer of the trial Court.—“Refused as stated.” (See Paper Book, page 12.)

Exception.—“The plaintiff excepts to the findings of fact and conclusions of law and decree in the above-entitled case in that the learned Court erred in the following particulars:

“5. In its answer to plaintiff's ninth request for finding of fact, which request and answer are as follows:

182 “9. The difference between anthracite, semi-anthracite, bituminous and semi-bituminous coal is one of degree and not of kind; it is a matter of difference in fixed carbon, volatile matter and dullness and brightness in appearance. They belong to one general class, are closely related both as to origin and use. There is as much difference between certain grades of anthracite as between some grades of anthracite and some grades of coal not called anthracite. All grades of coal, both anthracite and bituminous, are used for fuel purposes.

“Refused as stated.” (See Paper Book, page 49.)

Ruling of the Court.—“February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: ‘We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.’

“In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff.”

Fourth. The learned Court erred in dismissing the sixth exception of appellant to the refusal by the trial Court to affirm the seventeenth request of the plaintiff for finding of fact, which request, answer of the trial Court, exception and ruling of the court are as follows:

Request.—“Between October 2d, 1915, the date of the decision in Commonwealth vs. Alden Coal Company, 251 Pa., 134, and

163 May 11th, 1921, the Thomas Colliery Company expended upwards of \$100,000 in constructing and adding permanent improvements to washeries and the facilities immediately connected therewith designed for the recovery and preparation from culm banks of the coal therein of which by far the greater part consists of steam sizes and pea coal which are sold in direct competition with bituminous, semi-bituminous and semi-anthracite grades of coal in the fuel market both of Pennsylvania and outside of Pennsylvania; and said Thomas Colliery Company, during said period expended upwards of \$125,000 in constructing and adding permanent improvements to its coal mines and collieries for the production and preparation for market of fresh mined coal, approximately 40 per

centum of which consists of said pea and smaller sizes." (See Paper Book, page 13.)

Answer of the Trial Court.—"Refused as immaterial." (See Paper Book, page 14.)

Exception.—"The plaintiff excepts to the findings of fact and conclusions of law and decree in the above entitled case in that the learned Court erred in the following particulars:

"6. In its answer to plaintiff's seventeenth request for finding of fact, which request and answer are as follows:

"17. Between October 2d, 1915, the date of the decision in *Commonwealth vs. Alden Coal Company*, 251 Pa. 134, and May 11th, 1921, the Thomas Colliery Company expended upwards of \$100,000 in constructing and adding permanent improvements to washeries and the facilities immediately connected therewith designed for the recovery and preparation from culm banks of the coal therein of which by far the greater part consists of steam sizes and pea coal which are sold in direct competition with bituminous, semi-bituminous and semi-anthracite grades of coal in the fuel market both of Pennsylvania and outside of Pennsylvania; and said Thomas Colliery Company, during said period expended upwards of \$125,000 in constructing and adding permanent improvements to its coal mines and collieries for the production and preparation for market of fresh mined coal, approximately 40 per centum of which consists of said pea and smaller sizes.

"Refused as immaterial." (See Paper Book, pages 49-50.)

Ruling of the Court.—"February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: 'We find that if the Act of May 11th, 1921 were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.'

"In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff."

Fifth. The learned Court erred in dismissing the seventh exception of appellant to the refusal by the trial Court to affirm the eighteenth request of the plaintiff for finding of fact, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—"In said period the corporation and other owners, operators and lessees of anthracite coal mines in Pennsylvania have expended upwards of \$30,000,000 in constructing and adding permanent improvements to collieries, washeries, screening plants and other buildings and structures for the purpose of producing and preparing for market said anthracite coal, a large part of which expenditure was in connection with the construction and improvement of washeries and the facilities connected

therewith designed for the recovery and preparation for market of the pea and smaller sizes of coal contained in the culm banks appurtenant to such washeries." (See Paper Book, page 14).

Answer of the Trial Court.—"Refused as immaterial." (See Paper Book, page 14.)

Exception.—"The plaintiff excepts to the findings of fact and conclusions of law and decree in the above entitled case in that the learned Court erred in the following particulars:

"7. In its answer to plaintiff's eighteenth request for finding of fact, which request and answer are as follows:

"'18. In said period the corporations and other owners, operators and lessees of anthracite coal mines in Pennsylvania have expended upwards of \$30,000,000 in constructing and adding permanent improvements to collieries, washeries, screening plants and other buildings and structures for the purpose of producing and preparing for market said anthracite coal, a large part of which expenditure was in connection with the construction and improvement of washeries and the facilities connected therewith designed for the recovery and preparation for market of the pea and smaller sizes of coal contained in the culm banks appurtenant to such washeries.

"'Refused as immaterial.'" (See Paper Book, page 50.)

Ruling of the Court.—"February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: 'We find that if the Act of May 11th, 1921 were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.'

"In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff."

Sixth. The learned Court erred in dismissing the eighth exception of appellant to the refusal by the trial Court to affirm the nineteenth request of the plaintiff for finding of fact, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—"No notice was in fact ever published of the proposed introduction and enactment of the Act of May 11th, 1921, in any of the counties or localities in which anthracite coal is found." (See Paper Book, page 14.)

Answer of the Trial Court.—"We find this fact because it is not specifically denied in the answer, but we regard it as immaterial." (See Paper Book, page 14.)

Exception.—"The plaintiff excepts to the findings of fact and conclusions of law and decree in the above entitled case in that the learned Court erred in the following particulars:

"8. In its answer to plaintiff's nineteenth request for finding of fact, which request and finding are as follows:

"19. No notice was in fact ever published of the proposed introduction and enactment of the Act of May 11th, 1921, in any of counties or localities in which anthracite coal is found.

"We find this fact because it is not specifically denied in the answer, but we regard it as immaterial." (See Paper Book, page 50.)

187 Ruling of the Court.—"February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: 'We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional this request is refused.'

"In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff."

Seventh. The learned Court erred in dismissing the tenth exception of appellant to the refusal by the trial Court to affirm the twenty-second request of the plaintiff for finding of fact, which request and answer of the trial Court, exception and ruling of the Court are as follows:

Request.—"It is not alleged in the pleadings nor is it a fact that bituminous coal was not used for the manufacture of coke, gas and by-products prior to 1915." (See Paper Book, page 15.)

Answer of the Trial Court.—"Refused as immaterial." (See Paper Book, page 15.)

Exception.—"The plaintiff excepts to the findings of fact and conclusions of law and decree in the above-entitled case in that the learned Court erred in the following particulars:

"10. In its answer to plaintiff's twenty-second request for finding of fact, which request and answer are as follows:

"22. It is not alleged in the pleadings nor is it a fact that bituminous coal was not used for the manufacture of coke, gas and by-products prior to 1915.

168 "Refused as immaterial." (See Paper Book, page 51.)

Ruling of the Court.—"February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: 'We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury.'

In view of our conclusion that said Act is constitutional, this request is refused.

"In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff."

Eighth. The learned Court erred in dismissing the eleventh exception of appellant to the refusal by the trial Court to affirm the twenty-third request of the plaintiff for finding of fact, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—"The by-products obtained from bituminous coal are all obtainable from anthracite although not at present commercially produced therefrom." (See Paper Book, page 15.)

Answer of the Trial Court.—"Affirmed with the additional fact that such by-products cannot be produced from anthracite in quantities rendering such production commercially practical and none of which are produced therefrom." (See Paper Book, page 15.)

Exception.—"The plaintiff excepts to the findings of fact and conclusions of law and decree in the above entitled case in that the learned Court erred in the following particulars:

169 "11. In its answer to plaintiff's twenty-third request for finding of fact, which request and answer are as follows:

"23. The by-products obtained from bituminous coal are all obtainable from anthracite although not at present commercially produced therefrom.

"Affirmed with the additional fact that such by-products cannot be produced from anthracite in quantities rendering such production commercially practical and none of which are produced therefrom." (See Paper Book, page 51.)

Ruling of the Court.—"February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: 'We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.'

"In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff."

Ninth. The learned Court erred in dismissing the twelfth exception of appellant to the refusal by the trial Court to affirm the twenty-fifth request of the plaintiff for finding of fact, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—“Coke is used exclusively for fuel purposes.” (See Paper Book, page 16.)

Answer of the Trial Court.—“Refused. It appears in the answer that water gas and producer gas are made from coke.” (See Paper Book, page 16.)

170 Exception.—“The plaintiff excepts to the findings of fact and conclusions of law and decree in the above entitled case in that the learned Court erred in the following particulars:

“12. In its answer to plaintiff's twenty-fifth request for finding of fact, which request and answer are as follows:

“‘25. Coke is used exclusively for fuel purposes.

“‘Refused. It appears in the answer that water gas and producer gas are made from coke.’” (See Paper Book, page 51.)

Ruling of the Court.—“February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: ‘We find that if the Act of May 11th, 1921 were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.’

“In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff.”

Tenth. The learned Court erred in dismissing the thirteenth exception of appellant to the refusal by the trial court to affirm the twenty-sixth request of the plaintiff for finding of fact, which request, answer of the trial Court, exceptions and ruling of the Court are as follows:

Request.—“The gas extracted from bituminous coal in the coking process is used for fuel.” (See Paper Book, page 16.)

171 Answer of the Trial Court.—“Refused as stated. The gas liberated in the by-product process is saved and used for fuel and illumination, but the unliberated gas enters into other by-products not used for fuel.” (See Paper Book, page 16.)

Exception.—“The plaintiff excepts to the findings of fact and conclusions of law and decree in the above entitled case in that the learned Court erred in the following particulars:

13. In its answer to plaintiff's twenty-sixth request for finding of fact, which request and answer are as follows:

“‘26. The gas extracted from bituminous coal in the coking process is used for fuel.

“‘Refused as stated. The gas liberated in the by-products process is saved and used for fuel and illumination, but the unliberated gas enters into other by-products not used for fuel.’” (See Paper Book, page 51.)

Ruling of the Court.—"February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: 'We find that if the Act of May 11th, 1921 were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.'

"In all other respects the exception filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff."

Eleventh. The learned Court erred in dismissing the fourteenth exception of appellant to the refusal by the trial Court to affirm the twenty-seventh request of the plaintiff for finding of fact, which request, answer of the trial Court exception and ruling of the Court are as follows:

Request.—"The different grades of anthracite coal vary materially in the amount of fixed carbon and of volatile matter, as well as in color, lustre and structural character, hardness, compactness, cleanness and freedom from dust, and such material variation exists between the different grades of anthracite coal and semi-anthracite and semi-bituminous." (See Paper Book, page 16.)

Answer of the Trial Court.—"We find that the different grades vary in the particulars stated but there is nothing in the pleadings which justifies a finding that they vary materially or that such material variation exists between the different grades of anthracite and semi-anthracite and semi-bituminous coal." (See Paper Book, page 16.)

Exception.—"The plaintiff excepts to the findings of fact and conclusions of law and decree in the above entitled case in that the learned Court erred in the following particulars:

"14. In its answer to plaintiff's twenty-seventh request for finding of fact, which request and answer are as follows:

"27. The different grades of anthracite coal vary materially in the amount of fixed carbon and of volatile matter, as well as in color, lustre and structural character, hardness, compactness, cleanness and freedom from dust, and such material variation exists between the different grades of anthracite coal and semi-anthracite and semi-bituminous.

"We find that the different grades vary in the particulars stated but there is nothing in the pleadings which justifies a finding that they vary materially or that such material variation exists between the different grades of anthracite and semi-anthracite and semi-bituminous coal.'" See Paper Book, page 52.)

Ruling of the Court.—"February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered

on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: 'We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.'

"In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff."

Twelfth. The learned Court erred in dismissing the fifteenth exception of appellant to the refusal by the trial Court to affirm the twenty-eighth request of the plaintiff for finding of fact, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—"The fuel ratio of anthracite coal varies materially between the different grades, and the fuel ratio of the different grades of anthracite coal differs materially from that of semi-anthracite and semi-bituminous coal." (See Paper Book, page 16.)

Answer of the Trial Court.—"We find that the fuel ratio of anthracite coal varies, but we cannot find that such fuel ratio varies materially or that such ratio differs materially from that of semi-anthracite and semi-bituminous coal." (See Paper Book, page 16.)

Exception.—"The plaintiff excepts to the findings of fact and conclusions of law and decree in the above-entitled case in that the learned Court erred in the following particulars:

"15. In its answer to plaintiff's twenty-eighth request for finding of fact, which request and answer are as follows:

174 "28. The fuel ratio of anthracite coal varies materially as between the different grades, and the fuel ratio of the different grades of anthracite coal differs materially from that of semi-anthracite and semi-bituminous coal.

"We find that the fuel ratio of anthracite coal varies, but we cannot find that such fuel ratio varies materially or that such ratio differs materially from that of semi-anthracite and semi-bituminous coal." (See Paper Book, page 52.)

Ruling of the Court.—"February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: 'We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.'

"In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff."

Thirteenth. The learned Court erred in dismissing the sixteenth exception of appellant to the refusal by the trial Court to affirm the first request of the plaintiff for conclusion of law, which request, answer of the trial Court, exception and ruling of the Court are as follows—

Request.—“The Act of May 11th, 1921, is unconstitutional and void in that it offends against the First Section of Article IX of the Constitution of Pennsylvania, which provides as follows:

175 “All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.” (See Paper Book, page 17.)

Answer of the Trial Court.—“Denied.” (See Paper Book, page 17.)

Exception.—“The plaintiff excepts to the findings of fact and conclusions of law and decree in the above-entitled case in that the learned Court erred in the following particulars:

“16. In his answer to plaintiff's first request for conclusion of law, which request and answer are as follows:

“1. The Act of May 11th, 1921, is unconstitutional and void in that it offends against the first section of Article IX of the Constitution of Pennsylvania, which provides as follows:

““All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.”

“Denied.” (See Paper Book, page 52.)

Ruling of the Court.—“February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: ‘We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.’

“In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff.”

176 Fourteenth. The learned Court erred in dismissing the seventeenth exception of appellant to the refusal by the trial Court to affirm the second request of the plaintiff for conclusion of law, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—“The Act of May 11th, 1921, is unconstitutional and void in that it offends against the eighth section of Article III of the Constitution of Pennsylvania, which provides:

“No local or special bill shall be passed unless notice of the intention to apply therefor shall have been published in the locality where

the matter or the thing to be affected may be situated; which notice shall be at least twenty days prior to the introduction into the General Assembly of such bill and in the manner to be provided by law; the evidence of such notice having been published shall be exhibited in the General Assembly before such act shall be passed." (See Paper Book, page 17.)

Answer of the Trial Court.—"Denied." (See Paper Book, page 17.)

Exception.—"The plaintiff excepts to the findings of fact and conclusions of law and decree in the above-entitled case in that the learned Court erred in the following particulars:

"17. In its answer to plaintiff's second request for conclusion of law, which request and answer are as follows:

"2. The Act of May 11th, 1921, is unconstitutional and void in that it offends against the eighth section of Article III of the Constitution of Pennsylvania, which provides:

"No local or special bill shall be passed unless notice of the intention to apply therefor shall have been published in the locality where the matter or the thing to be affected may be situated; which notice shall be at least 20 days prior to the introduction into the General Assembly of such bill and in the manner to be provided by law; the evidence of such notice having been published shall be exhibited in the General Assembly before such act shall be passed."

"Denied." (See Paper Book, page 53.)

Ruling of the Court.—"February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: 'We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.'

"In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff."

Fifteenth. The learned Court erred in dismissing the eighteenth exception of appellant to the refusal by the trial Court to affirm the third request of the plaintiff for conclusion of law, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—"The Act of May 11th, 1921, is void in that it is a local or special bill and notice of the intention to apply therefor was not published as required by the provisions of the act entitled 'An act regulating the publishing of application for local or special legislation,' approved February 12th, 1874 (P. L. 43)." (See Paper Book, page 17.)

Answer of the Trial Court.—“Denied.” (See Paper Book, page 17).

178 Exception.—“The plaintiff excepts to the findings of fact and conclusions of law and decree in the above-entitled case in that the learned Court erred in the following particulars:

“18. In its answer to plaintiff’s third request for conclusion of law, which request and answer are as follows:

“3. The Act of May 11th, 1921, is void in that it is a local or special bill and notice of the intention to apply therefor was not published as required by the provisions of the act entitled “An act regulating the publishing of application for local or special legislation,” approved February 12th, 1874 (P. L. 43).

“Denied.” (See Paper Book, page 53.)

Ruling of the Court.—“February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff’s twentieth request for findings of fact is modified so as to read as follows: ‘We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional this request is refused.’

“In all other respects the exceptions filed by the plaintiff and the exceptions filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff.”

Sixteenth. The learned Court erred in dismissing the nineteenth exception of appellant to the refusal by the trial Court to affirm the fourth request of the plaintiff for conclusion of law, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—“The Act of May 11th, 1921, is void in that its provisions are indefinite and unenforceable for the reason that
179 it is impossible to determine from the act the exact date on or before which to file the annual report required by the provisions of the act to be filed with the Auditor General, and for the further reason that it is impossible to determine from the act when the penalties imposed thereby for neglect or failure to make said report are incurred, and for other reasons said act is indefinite and unenforceable and therefore void.” (See Paper Book, page 18).

Answer of the Trial Court.—“Denied.” (See Paper Book, page 18).

Exception.—“The plaintiff excepts to the findings of fact and conclusions of law and decree in the above-entitled case in that the learned Court erred in the following particulars:

“19. In its answer to plaintiff’s fourth request for conclusion of law, which request and answer are as follows:

“4. The Act of May 11th, 1921, is void in that its provisions are indefinite and unenforceable for the reason that it is impossible to determine from the act the exact date on or before which to file

the annual report required by the provisions of the act to be filed with the Auditor General, and for the further reason that it is impossible to determine from the act when the penalties imposed thereby for neglect or failure to make said report are incurred, and for other reasons said act is indefinite and unenforceable and therefore void.

"'Denied.'" (See Paper Book, page 53).

Ruling of the Court.—"February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified
180 so as to read as follows: 'We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said act is constitutional this request is refused.'

"In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff."

Seventeenth. The learned Court erred in dismissing the twentieth exception of appellant to the refusal by the trial Court to affirm the fifth request of the plaintiff for conclusion of law, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—"The Act of May 11th, 1921, is unconstitutional and void because it is in contravention of Clause 5 of Section 9 of Article I of the Constitution of the United States which provides that:

"'No tax or duties shall be laid on articles exported from the State.'

"This constitutional provision is violated for the reason that the larger part of anthracite coal is exported from the State." (See Paper Book, page 18).

Answer of the Trial Court.—"Denied." (See Paper Book, page 18).

Exception.—"The plaintiff excepts to the findings of fact and conclusions of law and decree in the above-entitled case in that the learned Court erred in the following particulars:

"20. In its answer to plaintiff's fifth request for conclusion of law, which request and answer are as follows:

"'5. The Act of May 11th, 1921, is unconstitutional and void because it is in contravention of Clause 5 of Section 9 of Article I of the Constitution of the United States which provides that:

"'No tax or duties shall be laid on articles exported from the State."

181 "This constitutional provision is violated for the reason that the larger part of anthracite coal is exported from the State.

"'Denied.'" (See Paper Book, page 54).

Ruling of the Court.—"February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: 'We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional this request is refused.'

"In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff"

Eighteenth. The learned Court erred in dismissing the twenty-first exception of appellant to the refusal by the trial Court to affirm the sixth request of the plaintiff for conclusion of law, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—"The Act of May 11th, 1921, is unconstitutional and void for the reason that it is in violation of Clause 3 of Section 8 of Article I of the Constitution of the United States, which provides that:

"'Congress shall have the power to regulate commerce with foreign nations and among the several states and with the Indian Territories.'

"This provision of the Constitution of the United States is violated for the reason that the larger part of the production of anthracite coal is used in interstate commerce among the several states and foreign nations, and it is beyond the power of the Legislature of Pennsylvania to interfere with such interstate commerce by imposing an arbitrary, unjust and unreasonable tonnage tax on an article of interstate commerce." (See Paper Book, pages 18-19).

Answer of the Trial Court.—"Denied." (See Paper Book, page 19.)

Exception.—"The plaintiff excepts to the findings of fact and conclusions of law and decree in the above entitled case in that the learned Court erred in the following particulars:

"21. In its answer to plaintiff's sixth request for conclusion of law, which request and answer are as follows:

"'6. The Act of May 11th, 1921, is unconstitutional and void for the reason that it is in violation of Clause 3 of Section 8 of Article I of the Constitution of the United States, which provides that:

"'Congress shall have the power to regulate commerce with foreign nations and among the several states and with the Indian Territories.'

"This provision of the Constitution of the United States is violated for the reason that the larger part of the production of anthracite coal is used in interstate commerce among the several states and

foreign nations, and it is beyond the power of the Legislature of Pennsylvania to interfere with such interstate commerce by imposing an arbitrary, unjust and unreasonable tonnage tax on an article of interstate commerce.

"Denied." (See Paper Book, page 54.)

Ruling of the Court.—"February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: 'We find that if the Act of May 11th, 1921, 183 were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional this request is refused.'

"In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff."

Nineteenth.—The learned Court erred in dismissing the twenty-second exception of appellant to the refusal by the trial Court to affirm the seventh request of the plaintiff for conclusion of law, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—"The Act of May 11th, 1921, is unconstitutional and void for the reason that it is in contravention of that portion of the Fourteenth Amendment of the Constitution of the United States, which reads as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

"The deposits of anthracite coal in Pennsylvania are to be enjoyed by the citizens of all the States." (See Paper Book, page 19.)

Answer of the Trial Court.—"Denied." (See Paper Book, page 19.)

Exception.—"The plaintiff excepts to the findings of fact and conclusions of law and decree in the above entitled case in that the learned Court erred in the following particulars:

"22. In its answer to plaintiff's seventh request for conclusion of law, which request and answer are as follows:

"7. The Act of May 11th, 1921, is unconstitutional and 184 void for the reason that it is in contravention of that portion of the Fourteenth Amendment of the Constitution of the United States, which reads as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due

process of law nor deny to any person within its jurisdiction the equal protection of the laws."

"The deposits of anthracite coal in Pennsylvania are to be enjoyed by the citizens of all the States.

"Denied." (See Paper Book, page 55.)

Ruling of the Court.—"February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: 'We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional this request is refused.'

"In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff."

Twentieth. The learned Court erred in dismissing the twenty-third exception of appellant to the refusal by the trial Court to affirm the eighth request of the plaintiff for conclusion of law, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—"It not appearing from the pleadings nor from the Court's knowledge of the facts that there has been any material change in the characteristics and uses of bituminous and anthracite coal since 1915, no reason appears for a reversal of the decisions by the Supreme Court of Pennsylvania in Commonwealth vs. Alden Coal Co., 251 Pa. 134, and Commonwealth vs. St. Clair Coal Co., 251 Pa. 159." (See Paper Book, page 19.)

Answer of the Trial Court.—"Denied." (See Paper Book, page 19.)

Exception.—"The plaintiff excepts to the findings of fact and conclusions of law and decree in the above entitled case in that the learned Court erred in the following particulars:

"23. In its answer to plaintiff's eighth request for conclusion of law which request and answer are as follows:

"8. It not appearing from the pleadings nor from the Court's knowledge of the facts that there has been any material change in the characteristics and uses of bituminous and anthracite coal since 1915, no reason appears for a reversal of the decisions by the Supreme Court of Pennsylvania in Commonwealth vs. Alden Coal Co., 251 Pa. 134, and Commonwealth vs. St. Clair Coal Co., 251 Pa. 159.

"Denied." (See Paper Book, page 55.)

Ruling of the Court.—"February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the 1st day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the

plaintiff's twentieth request for findings of fact is modified so as to read as follows: 'We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional this request is refused.'

"In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff."

186 Twenty-first. The learned Court erred in dismissing the twenty-sixth exception of appellant to the affirmance by the trial Court of the fifth request of the defendant for conclusion of law, which request, answer of the trial Court, exception and ruling of the Court are as follows:—

Request.—"Anthracite coal differs from bituminous coal in the following physical properties: the amount of fixed carbon, the amount of volatile matter, color, lustre and structural character. The percentage of fixed carbon in anthracite coal is much higher, and the percentage of volatile matter is much lower than in bituminous coal. Anthracite coal is hard, compact and comparatively clean and free from dust and is commonly termed 'hard coal,' while bituminous coal is very much less hard, and is dusty and dirty and is commonly termed 'soft coal.'" (See Paper Book, pages 20-21.)

Answer of the Trial Court.—"Affirmed." (See Paper Book, page 21.)

Exception.—"The plaintiff excepts to the findings of fact and conclusions of law and decree in the above-entitled case in that the learned Court erred in the following particulars:

"26. In affirming defendants' fifth request for finding of fact, the said request and the answer of the Court thereto being as follows:

"5. Anthracite coal differs from bituminous coal in the following physical properties: the amount of fixed carbon, the amount of volatile matter, color, lustre and structural character. The percentage of fixed carbon in anthracite coal is much higher, and the percentage of volatile matter is much lower than in bituminous coal. Anthracite coal is hard, compact and comparatively clean and free from dust and is commonly termed "hard coal," while bituminous coal is very much less hard, and is dusty and dirty and is commonly termed "soft coal."'" (See Paper Book, page 56.)

187 Ruling of the Court.—"February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the 1st day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: 'We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional this request is refused.'

"In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff."

Twenty-second. The learned Court erred in dismissing the twenty-eighth exception of appellant to the affirmance by the trial Court of the seventh request of the defendant for conclusion of law, which request, answer of the trial Court, exception, and ruling of the Court are as follows:—

Request.—"Substantially all anthracite coal is used for fuel only, but bituminous coal is used not only for fuel but as a raw material from which a great number and variety of commercial products are manufactured.

"Except as to structure, the general difference in physical properties between bituminous and anthracite coal is the same as the difference between bituminous coal and coke, a product which is manufactured from bituminous coal." (See Paper Book, page 21.)

Answer of the Trial Court.—"Affirmed." (See Paper Book, page 21.)

Exception.—"The defendant excepts to the findings of fact and conclusions of law and decree in the above entitled case in that the learned Court erred in the following particulars:

188 "28. In affirming the first paragraph of defendants' seventh request for finding of fact, the said request and the answer of the Court thereto being as follows:

"7. Substantially all anthracite coal is used for fuel only, but bituminous coal is used not only for fuel but as a raw material from which a great number and variety of commercial products are manufactured.

"Except as to structure, the general difference in physical properties between bituminous and anthracite coal is the same as the difference between bituminous coal and coke, a product which is manufactured from bituminous coal.

"Affirmed." (See Paper Book, page 57.)

Ruling of the Court.—"February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: 'We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.'

"In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff."

Twenty-third. The learned Court erred in dismissing the twentieth exception of appellant to the affirmance by the trial Court the eighth request of the defendant for conclusion of law, which request, answer of the trial Court, exception and ruling of the Court are as follows:—

Request.—“No county in Pennsylvania produces both anthracite and bituminous coal. Wherever one is present in Pennsylvania the other is absent.” (See Paper Book, page 21.)

Answer of the Trial Court.—“Affirmed.” (See Paper Book, page 21.)

Exception.—“The defendant excepts to the findings of fact and conclusions of law and decree in the above entitled case in that the learned Court erred in the following particulars:

“29. In affirming defendants' eighth request for finding of fact the fact therein stated being immaterial, which said request and the answer of the Court thereto are as follows:

“8. No county in Pennsylvania produces both anthracite and bituminous coal. Wherever one is present in Pennsylvania the other is absent.

“‘Affirmed.’” (See Paper Book, page 57.)

Ruling of the Court.—“February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.”

“In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff.”

Twenty-fourth. The learned Court erred in dismissing the thirteenth second exception of appellant to the affirmance by the trial Court the thirteenth request of the defendant for conclusion of law, which request, answer of the trial Court, exception and ruling of the Court are as follows:—

190 Request.—“A small percentage of anthracite produced in Pennsylvania is used in the production of gases, known as water-gas and producer-gas. Said gases, which are also produced from coke, are of a different character from that produced from bituminous coal. The gas produced from bituminous coal, known as coal gas, is produced from the volatile matter in said coal, while the said gases produced from anthracite are obtained by mixing the carbon of the coal combined with oxygen, in the form of CO , with nitrogen from the air, to obtain producer-gas, or with hydrogen from superheated water vapor, to obtain water-gas.” (See Paper Book, page 23.)

Answer of the Trial Court.—“Affirmed.” (See Paper Book, page 23.)

Exception.—“The defendant excepts to the findings of fact and conclusions of law and decree in the above entitled case in that the learned Court erred in the following particulars:

“32. In affirming defendants’ thirteenth request for finding of fact, the fact therein stated being immaterial, which said request and the answer of the Court thereto are as follows:

“13. A small percentage of anthracite produced in Pennsylvania is used in the production of gases, known as water-gas and producer-gas. Said gases, which are also produced from coke, are of a different character from that produced from bituminous coal. The gas produced from bituminous coal, known as coal gas, is produced from the volatile matter in said coal, while the said gases produced from anthracite are obtained by mixing the carbon of the coal combined with oxygen, in the form of CO , with nitrogen from the air, to obtain producer-gas, or with hydrogen from superheated water vapor, to obtain water-gas.

“Affirmed.” (See Paper Book, page 58.)

Ruling of the Court.—“February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff’s twentieth request for findings of fact is modified so as to read as follows: ‘We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said act is constitutional, this request is refused.’

“In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff.”

Twenty-fifth. The learned Court erred in dismissing the thirty-third exception of appellant to the affirmance by the trial Court of the fourteenth request of the defendant for finding of fact, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—“Bituminous coal is divided into two types—caking and non-caking or splint coal, that is, coals that will intumesce or run together in burning and those which do not run together but remain separate like blocks of wood. Practically all (at least 99 per cent) of the bituminous coal produced in Pennsylvania is of the caking type. This caking property is the foundation of the coking industry. While practically all of the bituminous coal of Pennsylvania is caking coal as aforesaid, not all of it will make commercially acceptable coke because of the percentage of phosphorus or sulphur. Methods of eliminating these impurities are being developed, whereby the percentage of the Pennsylvania bituminous coal available for the manufacture of marketable coke is increasing. Recent experi-

ments in by-product ovens indicate that practically all the bituminous coal in Pennsylvania will be available for the manufacture of marketable coke when the elimination of high sulphur and high phosphorus has been accomplished." (See Paper Book, page 23.)

Answer of the Trial Court.—"Affirmed." (See Paper Book, page 23.)

Exception.—"The defendant excepts to the findings of fact and conclusions of law and decree in the above-entitled case in that the learned Court erred in the following particulars:

"3. In affirming defendants' fourteenth request for finding of fact, the fact therein stated being immaterial, which said request and the answer of the Court thereto are as follows:

"14. Bituminous coal is divided into two types—caking and non-caking or splint coal, that is, coals that will intumesce or run together in burning and those which do not run together but remain separate like blocks of wood. Practically all (at least 99 per cent) of the bituminous coal produced in Pennsylvania is of the caking type. This caking property is the foundation of the coking industry. While practically all of the bituminous coal of Pennsylvania is caking coal as aforesaid, not all of it will make commercially acceptable coke because of the percentage of phosphorus or sulphur. Methods of eliminating these impurities are being developed, whereby the percentage of the Pennsylvania bituminous coal available for the manufacture of marketable coke is increasing. Recent experiments in by-product ovens indicate that practically all the bituminous coal in Pennsylvania will be available for the manufacture of marketable coke when the elimination of high sulphur and high phosphorus has been accomplished.

"Affirmed." (See Paper Book, page 58.)

Ruling of the Court.—"February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: 'We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.'

"In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff."

Twenty-sixth. The learned Court erred in dismissing the thirty-fourth exception of appellant to the affirmance by the trial Court of the fifteenth request of the defendant for finding of fact, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—"In the year 1911 more than one quarter of the bituminous coal produced in Pennsylvania was used in the manufacture

of coke. Later statistics are not available. Of the coal so used, approximately 72 per cent was manufactured into coke by the 'beehive oven process' and approximately 28 per cent by the 'by-product process.' The said beehive process is the old fashioned process and is being rapidly replaced by the by-product process. The said by-product process is usually operated near the place of consumption of the coke, with coal purchased from more than one source, and about one-half the coal produced in Pennsylvania and used in said process in 1918 was so used at points outside the State. Each process eliminates from the coal a large percentage of the volatile matter for the purpose of producing the coke. In the beehive process the volatile matter so extracted is dissipated in the atmosphere and lost, while in the by-product process the gas liberated is saved and used for fuel and illumination and, with some resultant chemical changes and by distillation and condensation, volatile matter is recovered in the form of tar or pitch, ammonia (used largely in the manufacture of fertilizers) cyanide and benzol and other oils used to generate power by internal combustion and for other purposes." (See Paper Book, pages 23-24.)

Answer of the Trial Court.—"Affirmed." (See Paper Book, page 24.)

Exception.—"The defendant excepts to the findings of fact and conclusions of law and decree in the above-entitled case in that the learned Court erred in the following particulars:

"34. In affirming defendants' fifteenth request for finding of fact, the fact therein stated being immaterial, which said request and the answer of the Court thereto are as follows:

"15. In the year 1918 more than one quarter of the bituminous coal produced in Pennsylvania was used in the manufacture of coke. Later statistics are not available. Of the coal so used, approximately 72 per cent. was manufactured into coke by the "beehive oven process" and approximately 28 per cent. by the by-product process." The said beehive process is the old fashioned process and is being rapidly replaced by the by-product process. The said by-product process is usually operated near the place of consumption of the coke, with coal purchased from more than one source, and about one-half the coal produced in Pennsylvania and used in said process in 1918 was so used at points outside the State. Each process eliminates from the coal a large percentage of the volatile matter for the purpose of producing coke. In the beehive process the volatile matter so extracted is dissipated in the atmosphere and lost, while in the by-product process the gas liberated is saved and used for fuel and illumination and, with some resultant chemical changes and by distillation and condensation, volatile matter is recovered in the form of tar or pitch, ammonia (used largely in the manufacture of fertilizers) cyanide and benzol and other oils used to generate power by internal combustion and for other purposes.

"Affirmed." (See Paper Book, page 59.)

Ruling of the Court.—"February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon

exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: 'We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.'

"In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff."

Twenty-seventh. The learned Court erred in dismissing the thirty-fifth exception of appellant to the affirmance by the trial Court of the sixteenth request of the defendant for findings of fact, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—"Much of the tar or pitch as recovered is used, among other purposes, in materials, for the surfacing of highways, the State Highway Department of Pennsylvania using annually from 3,000,000 to 6,000,000 gallons of such tar or pitch for such purpose."
(See Paper Book, page 24.)

Answer of the Trial Court.—"Affirmed." (See Paper Book, page 24.)

196 Exception.—"The defendant excepts to the findings of fact and conclusions of law and decree in the above entitled case in that the learned Court erred in the following particulars:

"35. In affirming defendants' sixteenth request for finding of fact, the fact therein stated being immaterial, which said request and the answer of the Court thereto are as follows:

"16. Much of the tar or pitch so recovered is used, among other purposes, in materials, for the surfacing of highways, the State Highway Department of Pennsylvania using annually from 3,000,000 to 6,000,000 gallons of such tar or pitch for such purpose.

"Affirmed." (See Paper Book, page 60.)

Ruling of the Court.—"February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: 'We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.'

"In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff."

Twenty-eighth. The learned Court erred in dismissing the thirty-sixth exception of appellant to the affirmance by the trial Court of

the seventeenth request of the defendant for finding of fact, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—“From said tar or pitch there are extracted by
197 various processes certain products which, though it is possible to extract them from anthracite, cannot be produced therefrom in quantities rendering such production commercially practicable and none of which are in practice produced therefrom. Said products include:

“Saccharine, a substitute for sugar, lampblack, dyes, sulphur compounds, indigo, carbolic acid and other antiseptics and germicides, explosives, including picric acid, ‘T. N. T.’ etc., flavoring materials, hydroquinine for photographic development, paints, cleansing compounds and paint removers, chloride, creosote, perfumery and hundreds of medicinal and other products in common use.” (See Paper Book, pages 24-25.)

Answer of the Trial Court.—“Affirmed.” (See Paper Book, page 25.)

Exception.—“The defendant excepts to the findings of fact and conclusions of law and decree in the above entitled case in that the learned Court erred in the following particulars:

“36. In affirming defendants’ seventeenth request for finding of fact, the fact therein stated being immaterial, which said request and the answer of the Court thereto are as follows:

“17. From said tar or pitch there are extracted by various processes certain products which, though it is possible to extract them from anthracite, cannot be produced therefrom in quantities rendering such production commercially practicable and none of which are in practice produced therefrom. Said products include:

“Saccharine, a substitute for sugar, lampblack, dyes, sulphur compounds, indigo, carbolic acid and other antiseptics and germicides, explosives, including picric acid, ‘T. N. T.’ etc., flavoring materials, hydroquinine for photographic development, paints, cleansing compounds and paint removers, chloride, creosote, perfumery and hundreds of medicinal and other products in common use.

198 “‘Affirmed.’” (See Paper Book, page 60.)

Ruling of the Court.—“February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff’s twentieth request for findings of fact is modified so as to read as follows: ‘We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.’

“In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff.”

Twenty-ninth. The learned Court erred in dismissing the thirty-seventh exception of appellant to the affirmance by the trial Court of the eighteenth request of the defendant for finding of fact, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—"Coke cannot be made from anthracite coal." (See Paper Book, page 25.)

Answer of the Trial Court.—"Affirmed." (See Paper Book, page 25.)

Exception.—"The defendant excepts to the findings of fact and conclusions of law and decree in the above entitled case in that the learned Court erred in the following particulars:

"37. In affirming defendants' eighteenth request for finding of fact, the facts therein stated being immaterial and not being in accordance with present scientific knowledge, which said request and the answer of the Court thereto are as follows:

"18. Coke cannot be made from anthracite coal.

"Affirmed." (See Paper Book, page 61.)

199 Ruling of the Court.—"February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: 'We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.'

"In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff."

Thirtieth. The learned Court erred in dismissing the thirty-eighth exception of appellant to the affirmance by the trial Court of the nineteenth request of the defendant for finding of fact, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—"For the year 1917, the latest figures available, approximately thirty-five per cent. of the coal used in the said by-product process in the United States, and more than half of that used in the beehive process was produced in Pennsylvania. In the year 1918 the quantities produced and the prices of the quantities sold of certain of the by-products obtained in the said by-product process operation in the United States were as follows: tar, 263,299,470 gallons, \$6,364,972; ammonia, 510,618,293 pounds, \$26,442,951; gas, \$885,035,154,000 cubic feet, \$13,699,515; benzol products, 145,405,811 gallons, \$25,688,446; naphthalene, 16,087,498 pounds, \$650,229; other products, \$1,756,345; total \$74,602,458." (See Paper Book, page 25.)

Answer of the trial Court.—“Affirmed.” (See Paper Book, page 25.)

200 Exception.—“The defendant excepts to the findings of fact and conclusions of law and decree in the above entitled case in that the learned Court erred in the following particulars:

“38. In affirming defendants’ nineteenth request for finding of fact, the fact therein stated being immaterial, which said request and the answer of the Court thereto are as follows:

“19. For the year 1917, the latest figures available, approximately thirty-five per cent. of the coal used in the said by-product process in the United States, and more than half of that used in the beehive process was produced in Pennsylvania. In the year 1918, the quantities produced and the prices of the quantities sold of certain of the by-products obtained in the said by-product process operations in the United States were as follows: tar, 263,299,470 gallons, \$6,364,972; ammonia, 510,618,293 pounds, \$26,442,951; gas, 385,035,154,000 cubic feet, \$13,699,515; benzol, products, 145,405,811 gallons, \$25,688,446; naphthaline, 16,087,498 pounds, \$650,229; other products, \$1,756,345; total \$74,602,458.

“Affirmed.” (See Paper Book, page 61.)

Ruling of the Court.—“February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff’s twentieth request for findings of fact is modified so as to read as follows: ‘We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said act is constitutional, this request is refused.’

“In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff.”

201 Thirty-first. The learned Court erred in dismissing the thirty-ninth exception of appellant to the affirmance by the trial Court of the twentieth request of the defendant for finding of fact, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—“In 1918 the total production of coke in the United States was about 56,000,000 tons of a value of about \$382,000,000 at the ovens, and of said total production about forty-seven per cent. was produced in Pennsylvania.” (See Paper Book, page 25.)

Answer of the Trial Court.—“Affirmed.” (See Paper Book, page 25.)

Exception.—“The defendant excepts to the findings of fact and conclusions of law and decree in the above entitled case in that the learned Court erred in the following particulars:

“39. In affirming defendants’ twentieth request for findings of

fact, the fact therein stated being immaterial, which said request and the answer of the Court thereto being as follows:

"20. In 1918 the total production of coke in the United States was about 56,000,000 tons of a value of about \$382,000,000 at the ovens, and of said total production about 47 per cent., was produced in Pennsylvania.

"Affirmed." (See Paper Book, page 61.)

Ruling of the Court.—"February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: 'We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said act is constitutional, this request is refused.'

202 "In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff."

Thirty-second. The learned Court erred in dismissing the forty-first exception of appellant to the affirmance by the trial Court of the twenty-second request of the defendant for finding of fact, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—"The railroads of Pennsylvania, in their commodities classification, place coal in two classes—bituminous and anthracite. Anthracite is sub-classified into at least three classes: (a) domestic sizes (larger than pea coal); (b) pea coal; (c) smaller than pea coal; all carrying different freight rates." (See Paper Book, page 26.)

Answer of the Trial Court.—"Affirmed. We cannot say that it is not material in determining the classification for the purpose of taxation." (See Paper Book, page 26.)

Exception.—"The defendant excepts to the findings of fact and conclusions of law and decree in the above entitled case in that the learned Court erred in the following particulars:

"41. In affirming defendants' twenty-second request for finding of fact, the fact therein stated being immaterial, which said request and the answer of the Court thereto are as follows:

"22. The railroads of Pennsylvania, in their commodities classification, place coal in two classes—bituminous and anthracite. Anthracite is sub-classified into at least three classes: (a) domestic sizes (larger than pea coal); (b) pea coal; (c) smaller than pea coal; all carrying different freight rates.

"Affirmed. We cannot say that it is not material in determining the classification for the purpose of taxation." (See Paper Book, page 62.)

208 Ruling of the Court.—“February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decree as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: ‘We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said act is constitutional, this request is refused.’

“In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff.”

Thirty-third. The learned Court erred in dismissing the forty-second exception of appellant to the affirmance by the trial Court of the twenty-third request of the defendant for finding of fact, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—“The Congress of the United States, in levying import taxes, has placed bituminous and anthracite coal in separate classes in the following instances;

“(a) The Act of March 2d, 1861 (12 Stat. L. 178, 182), placed a tax of \$1 per ton on bituminous coal and a tax of 50 cents per ton on all other coal.

“(b) The Act of June 30th, 1864 (13 Stat. L. 202, 206), placed a tax of \$1.25 a ton on bituminous coal and shale and a tax of 40 cents per ton on all other coal.

“(c) The Act of July 14th, 1870 (16 Stat. L. 256, 266), passed to remove certain commodities from the taxable list to the free list, enumerates anthracite coal as one of said commodities.

204 “(d) In the Act of March 3d, 1883 (22 Stat. L. 488, 511), a tax of 75 cents per ton is laid on bituminous coal and anthracite is named on the free list.

“(e) In the Act of October 1st, 1890 (26 Stat. L. 567, 600), a tax of 75 cents per ton is laid on bituminous coal and anthracite coal is named on the free list.

“(f) In the Act of August 27th, 1894 (28 Stat. L. 509, 533), a tax of 40 cents per ton is laid on bituminous coal and anthracite coal is named on the free list.

“(g) In the Act of July 24th, 1897 (30 Stat. L. 151, 190), a tax of 97 cents per ton is laid on bituminous coal and all coal containing less than 92 per cent of fixed carbon and anthracite coal, not specially provided for in the Act, is named on the free list.

“(h) In the Act of August 5th, 1909 (36 Stat. L. Part One, 11, 65), a tax of 45 cents per ton is laid on bituminous coal and anthracite coal is named on the free list.

“The present Tariff Act of 1913 places all coal on the free list.”
(See Paper Book, page 27.)

Answer of the Trial Court.—“Affirmed for the reason given in making the twenty-second finding.” (See Paper Book, page 27.)

Exception.—“The defendant excepts to the findings of fact and conclusions of law and decree in the above-entitled case in that the learned Court erred in the following particulars:

“42. In affirming defendants’ twenty-third request for finding of fact, the fact therein stated being immaterial, which said request and the answer of the Court thereto are as follows:

“23. The Congress of the United States, in levying import taxes, has placed bituminous and anthracite coal in separate classes in the following instances:

“(a) The Act of March 2d, 1861 (12 Stat. L. 178, 182), placed a tax of \$1 per ton on bituminous coal and a tax of 50 cents per ton on all other coal.

205 “(b) The Act of June 30th, 1864 (13 Stat. L. 202, 208), placed a tax of \$1.25 a ton on bituminous coal and shale and a tax of 40 cents per ton on all other coal.

“(c) The Act of July 14th, 1870 (16 Stat. L. 256, 266), passed to remove certain commodities from the taxable list to the free list, enumerates anthracite coal as one of said commodities.

“(d) In the Act of March 3d, 1883 (22 Stat. L. 483, 511), a tax of 75 cents per ton is laid on bituminous coal and anthracite is named on the free list.

“(e) In the Act of October 1st, 1890 (26 Stat. L. 567, 600), a tax of 75 cents per ton is laid on bituminous coal and anthracite coal is named on the free list.

“(f) In the Act of August 27th, 1894 (28 Stat. L. 509, 533), a tax of 40 cents per ton is laid on bituminous coal and anthracite coal is named on the free list.

“(g) In the Act of July 24th, 1897 (30 Stat. L. 151, 190), a tax of 67 cents per ton is laid on bituminous coal and all coal containing less than 92 per cent of fixed carbon and anthracite coal, not specially provided for in the Act, is named on the free list.

“(h) In the Act of August 5th, 1909 (36 Stat. L. Part One, 11, 65), a tax of 45 cents per ton is laid on bituminous coal and anthracite coal is named on the free list.

“The present Tariff Act of 1913 places all coal on the free list.

“Affirmed for the reason given in making the twenty-second finding.” (See Paper Book, page 62.)

Ruling of the Court.—“February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to 206 the plaintiff’s twentieth request for findings of fact, is modified so as to read as follows: ‘We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.’”

"In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff."

Thirty-fourth. The learned Court erred in dismissing the forty-third exception of appellant to the affirmance by the trial Court of the twenty-fourth request of the defendant for finding of fact, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—"The Canadian Parliament, in levying import taxes, has placed bituminous and anthracite coal in separate classes in the following instances:

"(a) In Vol. I of the Revised Statutes of Canada, 1886, Chapter 33, page 373, a tax of 50 cents per ton of 2,000 pounds was placed on anthracite coal and a tax of 60 cents per ton of 2,000 pounds was placed on bituminous coal.

"(b) By the Act of June 23d, 1887, page 130 (Chapter 39), anthracite coal was placed on the free list, the duty on bituminous coal being retained.

"(c) By the Act of July 23d, 1894, a tax of 60 cents per ton of 2,000 pounds was placed on bituminous coal and anthracite coal was placed on the free list.

"(d) By the Act of June 29th, 1897, pages 85 and 101, rates of taxation, dependent upon the sizes, were placed upon bituminous coal and anthracite coal was placed on the free list." (See Paper Book, page 27.)

Answer of the Trial Court.—"Affirmed for the reason given in making the twenty-second finding." (See Paper Book, page 27.)

Exception.—"The defendant excepts to the findings of fact and conclusions of law and decree in the above-entitled case in 207 that the learned Court erred in the following particulars:

"43. In affirming defendants' twenty-fourth request for finding of fact, the fact therein stated being immaterial, which said request and the answer of the Court thereto are as follows:

"24. The Canadian Parliament, in levying import taxes, has placed bituminous and anthracite coal in separate classes in the following instances:

"(a) In Vol. I of the Revised Statutes of Canada, 1886, Chapter 33, page 373, a tax of 50 cents per ton of 2,000 pounds was placed on anthracite coal and a tax of 60 cents per ton of 2,000 pounds was placed on bituminous coal.

"(b) By the Act of June 23d, 1887, page 130 (Chapter 39), anthracite coal was placed on the free list, the duty on bituminous coal being retained.

"(c) By the Act of July 23d, 1894, a tax of 60 cents per ton of 2,000 pounds was placed on bituminous coal and anthracite coal was placed on the free list.

"(d) By the Act of June 29th, 1897, pages 85 and 101, rates of taxation, dependent upon the sizes, were placed upon bituminous coal and anthracite coal was placed on the free list.

"'Affirmed for the reason given in making the twenty-second finding.'" (See Paper Book, page 63.)

Ruling of the Court.—February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: 'We find that if the Act of May 11th, 1921, was unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.'

208 "In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff."

Thirty-fifth.—The learned Court erred in dismissing the forty-fourth exception of appellant to the affirmance by the trial Court of the twenty-fifth request of the defendant for finding of fact, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—"By Act approved May 18th, 1878, P. L. 67, the standard weight of bituminous coal in this Commonwealth is fixed at 70 pounds to the bushel and 2,000 pounds to the ton, penalties being imposed upon persons engaged in the mining of bituminous coal who shall fix any other standard. By Act approved June 26th, 1895, P. L. 334, the weight of 2,240 pounds avoirdupois is made to constitute the legal ton of anthracite coal in the Commonwealth in all transactions between retail coal dealers and their customers." (See Paper Book, pages 27-28.)

Answer of the Trial Court.—"Affirmed." (See Paper Book, page 28.)

Exception.—"The defendant excepts to the findings of fact and conclusions of law and decree in the above-entitled case in that the learned Court erred in the following particulars:

"44. In affirming defendants' twenty-fifth request for finding of fact, the fact therein stated being immaterial, which said request and the answer of the Court thereto are as follows:

"25. By Act approved May 18th, 1878, P. L. 67, the standard weight of bituminous coal in this Commonwealth is fixed at 70 pounds to the bushel and 2,000 pounds to the ton, penalties being imposed upon persons engaged in the mining of bituminous coal who shall fix any other standard. By Act approved June 26th, 1895, P. L. 334, the weight of 2,240 pounds avoirdupois is made to constitute the legal ton of anthracite coal in the Commonwealth in all transactions between retail coal dealers and their customers.

"'Affirmed.'" (See Paper Book, page 64.)

Ruling of the Court.—“February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: ‘We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.’

“In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff.”

Thirty-sixth.—The learned Court erred in dismissing the forty-fifth exception of appellant to the affirmance by the trial Court of the twenty-sixth request of the defendant for finding of fact, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—“The price of anthracite on cars at the mine is ordinarily much larger than the price of bituminous on cars at the mine, the difference resulting largely from differences in rates of royalty and cost of production and preparation for market.” (See Paper Book, page 28.)

Answer of the Trial Court.—“Affirmed.” (See Paper Book, page 28.)

Exception.—“The defendant excepts to the findings of fact and conclusions of law and decree in the above-entitled case in that the learned Court erred in the following particulars:

210 “45. In affirming defendants' twenty-sixth request for finding of fact, the fact therein stated being immaterial, which said request and the answer of the Court thereto are as follows:

“26. The price of anthracite on cars at the mine is ordinarily much larger than the price of bituminous coal on cars at the mine, the difference resulting largely from differences in rates of royalty and cost of production and preparation for market.

“Affirmed.” (See Paper Book, page 64.)

Ruling of the Court.—“February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: ‘We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.’

“In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff.”

Thirty-seventh. The learned Court erred in dismissing the forty-sixth exception of appellant to the affirmance by the trial Court of the twenty-seventh request of the defendant for finding of fact which request, answer of the trial Court, exception and ruling of the Court are as follows:—

Request.—“The State of Pennsylvania has enacted two separate and distinct laws regulating the mining of coal, to wit: the Act of June 2d, 1891, P. L. 176, and its supplements regulating only the mining and preparation of anthracite and the Act of June 9, 1911, P. L. 756, and its supplements applying only to the mining of bituminous coal.” (See Paper Book, page 28.)

211 Answer of the Trial Court.—“Affirmed.” (See Paper Book, page 28.)

Exception.—“The defendant excepts to the findings of fact and conclusions of law and decree in the above-entitled case in that the learned Court erred in the following particulars:

“46. In affirming defendants’ twenty-seventh request for finding of fact, the fact therein stated being immaterial, which said request and the answer of the Court thereto are as follows:

“27. The State of Pennsylvania has enacted two separate and distinct laws regulating the mining of coal, to wit: The Act of June 2d, 1891, P. L. 176, and its supplements regulating only the mining and preparation of anthracite, and the Act of June 9th, 1911, P. L. 756, and its supplements applying only to the mining of bituminous coal.

“‘Affirmed.’” (See Paper Book, page 65.)

Ruling of the Court.—“February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff’s twentieth request for findings of fact is modified so as to read as follows: ‘We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.’

“In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff.”

Thirty-eighth. The learned Court erred in dismissing the forty-seventh exception of appellant to the affirmance by the trial Court of the twenty-eighth request of the defendant for finding of fact, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—“Anthracite coal and bituminous coal are two distinctly different commodities and are recognized as such in the commercial world and by the public generally.” (See Paper Book, page 28.)

Answer of the trial Court.—“Affirmed.” (See Paper Book, page 28.)

Exception.—“The defendant excepts to the findings of fact and conclusions of law and decree in the above-entitled case in that the learned Court erred in the following particulars:

“47. In affirming defendants’ twenty-eighth request for finding of fact, the fact therein stated being incorrect and not being based on an averment in the record, which said request and the answer of the Court thereto are as follows:

“28. Anthracite coal and bituminous coal are two distinctly different commodities and are recognized as such in the commercial world and by the public generally.

“‘Affirmed.’” (See Paper Book, page 65.)

Ruling of the Court.—“February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff’s twentieth request for findings of fact is modified so as to read as follows: ‘We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.’

“In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff.”

213 Thirty-ninth. The learned Court erred in dismissing the forty-eighth exception of appellant to the affirmance by the trial Court of the twenty-ninth request of the defendant for finding of fact, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—“In addition to coke and gas used for fuel and illumination, there is extracted from bituminous coal a large number of commercial products not used or usable for fuel purposes.” (See Paper Book, page 28.)

Answer of the Trial Court.—“Affirmed.” (See Paper Book, page 28.)

Exception.—“The defendant excepts to the findings of fact and conclusions of law and decree in the above-entitled case in that the learned Court erred in the following particulars:

“48. In affirming defendants’ twenty-ninth request for finding of fact, the fact therein stated being immaterial and incorrect, which said request and the answer of the Court thereto are as follows:

“29. In addition to coke and gas used for fuel and illumination, there is extracted from bituminous coal a large number of commercial products not used or usable for fuel purposes.

“‘Affirmed.’” (See Paper Book, page 65.)

Ruling of the Court.—“February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first

day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: 'We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional this request is refused.'

214 "In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff."

Fortieth. The learned Court erred in dismissing the forty-ninth exception of appellant to the affirmance by the trial Court of the first request of the defendant for conclusion of law, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—"The Act of General Assembly No. 225 approved May 11th, 1921, entitled 'An Act imposing a State tax on anthracite coal providing for the assessment and collection thereof, and providing penalties for violations of this Act,' is not in violation of any provision of the Constitution of Pennsylvania or of the Constitution of the United States." (See Paper Book, page 29).

Answer of the Trial Court.—"Affirmed." (See Paper Book, page 29).

Exception.—"The defendant excepts to the findings of fact and conclusions of law and decree in the above-entitled case in that the learned Court erred in the following particulars:

"49. In affirming defendants' first request for conclusion of law, which request and the answer of the Court are as follows:

"1. The Act of General Assembly No. 225 approved May 11th, 1921, entitled 'An Act imposing a State Tax on anthracite coal providing for the assessment and collection thereof, and providing penalties for violations of this Act,' is not in violation of any provision of the Constitution of Pennsylvania or of the Constitution of the United States.

"'Affirmed.' " (See Paper Book, page 66).

Ruling of the Court.—"February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: 'We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.'

"In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff."

Forty-first. The learned Court erred in dismissing the fiftieth exception of appellant to the affirmance by the trial Court of the second request of the defendant for conclusion of law, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—“The Act of May 11th, 1921, is not in violation of Section 1 of Article IX of the Constitution of Pennsylvania.” (See Paper Book, page 29).

Answer of the Trial Court.—“Affirmed.” (See Paper Book, page 29).

Exception.—“The defendant excepts to the findings of fact and conclusions of law and decree in the above-entitled case in that the learned Court erred in the following particulars:

“50. In affirming defendants’ second request for conclusion of law, which request and the answer of the Court are as follows:

“‘2. The Act of May 11th, 1921, is not in violation of Section 1 of Article IX of the Constitution of Pennsylvania.

“‘Affirmed.’” (See Paper Book, page 66).

Ruling of the Court.—“February 15th, 1922, this cause 216 having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff’s twentieth request for findings of fact is modified so as to read as follows: ‘We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.’

“In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff.”

Forty-second. The learned Court erred in dismissing the fifty-first exception of appellant to the affirmance by the trial Court of the third request of the defendant for conclusion of law, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—“The Act of May 11th, 1921, is not in violation of Section 8 of Article III of the Constitution of Pennsylvania.” (See Paper Book, page 29).

Answer of the Trial Court.—“Affirmed.” (See Paper Book, page 29).

Exception.—“The defendant excepts to the findings of fact and conclusions of law and decree in the above-entitled case in that the learned Court erred in the following particulars:

“51. In affirming defendants’ third request for conclusion of law, which request and the answer of the Court are as follows:

"3. The Act of May 11th, 1921, is not in violation of Section 8 of Article III of the Constitution of Pennsylvania.

"Affirmed." (See Paper Book, page 66).

217 Ruling of the Court.—"February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: 'We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.'

"In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff."

Forty-third. The learned Court erred in dismissing the fifty-second exception of appellant to the affirmance by the trial Court of the fourth request of the defendant for conclusion of law, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—"The Act of May 11th, 1921, is not in violation of Clause 5, Section 9, Article I, of the Constitution of the United States." (See Paper Book, page 29).

Answer of the Trial Court.—"Affirmed." (See Paper Book, page 29).

Exception.—"The defendant excepts to the findings of fact and conclusions of law and decree in the above-entitled case in that the learned Court erred in the following particulars:

"52. In affirming defendants' fourth request for conclusion of law, which request and the answer of the Court are as follows:

"4. The Act of May 11th, 1921, is not in violation of Clause 5, Section 9, Article I, of the Constitution of the United States.

218 "Affirmed." (See Paper Book, page 66.)

Ruling of the Court.—"February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: 'We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.'

"In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff."

Forty-fourth. The learned Court erred in dismissing the fifty-third exception of appellant to the affirmance by the trial Court of the fifth request of the defendant for conclusion of law which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—“The Act of May 11th, 1921, is not in violation of Clause 3, Section 8, Article I, of the Constitution of the United States.” (See Paper Book, page 29.)

Answer of the Trial Court.—“Affirmed.” (See Paper Book, Page 29.)

Exception.—“The defendant excepts to the findings of fact and conclusions of law and decree in the above-entitled case in that the learned Court erred in the following particulars:

“53. In affirming defendants’ fifth request for conclusion of law, which request and the answer of the Court are as follows:

“5. The Act of May 11th, 1921, is not in violation of Clause 3, Section 8, Article I, of the Constitution of the United States.

219 “‘Affirmed.’” (See Paper Book, page 67.)

Ruling of the Court.—“February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff’s twentieth request for findings of fact is modified so as to read as follows: ‘We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.’

“In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff.”

Forty-fifth. The learned Court erred in dismissing the fifty-fourth exception of appellant to the affirmance by the trial Court of the sixth request of the defendant for conclusion of law, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—“The Act of May 11th, 1921, is not in violation of the Fourteenth Amendment of the Constitution of the United States.” (See Paper Book, page 29.)

Answer of the Trial Court.—“Affirmed.” (See Paper Book, page 29.)

Exception.—“The defendant excepts to the findings of fact and conclusion of law and decree in the above-entitled case in that the learned Court erred in the following particulars:

“54. In affirming defendants’ sixth request for conclusion of law, which request and the answer of the Court are as follows:

“6. The Act of May 11th, 1921, is not in violation of the Fourteenth Amendment of the Constitution of the United States.

220 “‘Affirmed.’” (See Paper Book, page 67.)

Ruling of the Court.—“February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course

upon exceptions to the decree nisi heretofore entered on the first day of February, 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: 'We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.'

"In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff."

Forty-sixth. The learned Court erred in dismissing the fifty-fifth exception of appellant to the affirmance by the trial Court of the seventh request of the defendant for conclusion of law, which request, answer of the trial Court, exception and ruling of the Court are as follows:

Request.—"The plaintiff is not entitled to the relief prayed for in his bill." (See Paper Book, page 30.)

Answer of the Trial Court.—"Affirmed." (See Paper Book, page 30.)

Exception.—"The defendant excepts to the findings of fact and conclusion of law and decree in the above-entitled case in that the learned Court erred in the following particulars:

"55. In affirming defendants' seventh request for conclusion of law, which request and the answer of the Court are as follows:

"7. The plaintiff is not entitled to the relief prayed for in his bill.

"'Affirmed.'" (See Paper Book, page 67.)

221 Ruling of the Court.—"February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February 1922, and argument thereon having been heard it is now ordered and decreed as follows: The answer of the Court to the plaintiff's twentieth requests for findings of fact is modified so as to read as follows: 'We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.'

"In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff."

Forty-seventh. The learned Court below erred in entering its final decree dismissing the plaintiff's bill, which decree and the exception thereto are as follows:

Decree.—"February 15th, 1922, this cause having come on to be heard before the Court in banc in regular course upon exceptions to the decree nisi heretofore entered on the first day of February 1922, the argument thereon having been heard it is now ordered and decreed

as follows: The answer of the Court to the plaintiff's twentieth request for findings of fact is modified so as to read as follows: 'We find that if the Act of May 11th, 1921, were unconstitutional, the plaintiff would suffer an irreparable injury. In view of our conclusion that said Act is constitutional, this request is refused.'

"In all other respects the exceptions filed by the plaintiff and the exception filed by the defendant are overruled and the bill of complaint is dismissed at the cost of the plaintiff." (See Paper Book, page 68.)

Exception.—"And now, February 15th, 1922, an exception to this decree is allowed to the plaintiff and a bill is sealed. See decree filed." (See Paper Book, page 68.)

REESE H. HARRIS,
HENRY S. DRINKER, JR.,
FRANK W. WHEATON,
Attorneys for Appellant.

222 (Endorsement:) No. 15, May Term, 1922. Supreme Court of Pennsylvania, Middle District. Roland C. Heisler, Appellant, and Thomas Colliery Company et al., Defendants. Assignments of Error. Reese H. Harris, Henry S. Drinker, Jr., Frank W. Wheaton, Attorneys for Appellant. Filed in Supreme Court Apr. 11, 1922. Philadelphia.

223 *Majority Opinion of the Supreme Court of Pennsylvania.*

In the Supreme Court of Pennsylvania for the Middle District.

No. 15, May Term, 1922.

ROLAND C. HEISLER, Appellant,

v.

THOMAS COLLIERY COMPANY, E. HERBERT SUENDER, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania.

Appeal from a Decree of the Court of Common Pleas of Dauphin County, as of No. 709, Equity Docket.

224 *Opinion of the Court.*

SIMPSON, J.:

Plaintiff appeals from a decree of the court below dismissing his bill in equity to have the Act of May 11th, 1921, P. L. 479, "imposing a State tax on anthracite coal", declared unconstitutional. The case was heard upon the pleadings, without evidence being produced; hence, while only those averments of the bill, which are unchal-

lenged by the answer, are to be accepted as true, all the averments of the latter must be so regarded, if they have any bearing on the controversy.

At the threshold of the argument, we are met with the allegation that *stare decisis* controls; the basis of this claim being that at the time we decided, in *Commonwealth v. Alden Coal Co.*, 251 Pa. 132, and *Commonwealth v. St. Clair Coal Co.*, 251 Pa. 159, that the cognate Act of June 27th, 1913, P. L. 639, violated Article IX section 1 of the Constitution of the State, all the facts existed which are now relied on to sustain the Act of 1921, though many of them were not proved, admitted or found in the trial of those cases. This contention indicates a misconception of legal principles, in that it attempts to apply the rules growing out of a former adjudication between the same parties, to those appertaining to a prior judgment between different parties. When *res adjudicata* is applicable, every essential fact, proved or unproved, as well as the ultimate fact found, must be treated as established, when pertinent for consideration in a later suit between the same parties; where as *stare decisis* simply declares that, for the sake of certainty, a conclusion reached

225 in one case should be applied to those which follow, if the facts are substantially the same, even though the parties may be different. Similarity of the relevant facts being necessary, it follows that if here they are essentially different from those in the *Alden Coal Co.*, and *St. Clair Coal Co.*, cases, *supra*, (as the court below found they were), its ruling that *stare decisis* did not apply was necessarily correct. Indeed this is particularly so, where, as here, the decision depends not on the effect of some of the facts, but upon the combined force of all that are proved at the time the question arises, when the progress of science or the course of trade may, since the prior decision, have greatly changed the uses to which one or both of the commodities may be put.

Moreover, *stare decisis* has no real place in constitutional law when the validity of another statute is under consideration. The reasons which actuated our predecessors in declaring an Act unconstitutional, has and should have great weight with us, when determining whether or not a later similar statute is likewise objectionable, but if, after having fully considered the matter, we are nevertheless impelled to the conclusion that the later enactment is constitutional, we cannot decide otherwise, unless we are to forget our duty to support the constitution as the supreme law. Our reason for this conclusion cannot be better expressed than by interpolating a few appropriate words into the wonderfully simply and convincing language of Chief Justice Marshall, when considering whether or not the courts have the power to declare a statute unconstitutional: "If both the law (i. e. the statute backed by the court's prior error, if it was such) and the constitution apply to a case, so

226 that the court must either decide that case conformably to the law (i. e. the erroneous decision declaring it to be so), disregarding the constitution, or conformably to the constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence

of judicial duty": *Marbury v. Madison*, 1 Cranch, 137, 178. To this it may be added (though somewhat aside from the present inquiry) that it is at least as important now as it ever was, that doubts as to the constitutionality of a statute (though arising from a prior decision) should always be resolved in favor of constitutionality.

On the main question—is the Act of 1921 constitutional?—we first observe that Article IX section 1 of the Constitution, relied upon to defeat the statute, in fact concedes the right of the legislature to classify the subjects of taxation. It says: "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax." In form this is restrictive, but it none the less recognizes that the power which had theretofore existed in the general assembly to legislate upon all subjects not forbidden by the constitution, still exists so far as relates to taxation, limited only by the provision as to uniformity. Despite appellant's argument, it is clear that an entirely different situation exists when the question arises under Article III, section 7, for there no power to classify is conceded, indeed, impliedly at least, it is denied; hence legislation, based on classification regarding the subjects there specified, can be sustained only where there is "a necessity springing from manifest peculiarities clearly distinguishing those of one class from

each of the other classes, and imperatively demanding legis-
 227 lation for each class, separately, that would be useless and detrimental to the others" (*Ayar's Appeal*, 122 Pa. 266, 281; *Comm. v. Schumacher*, 255 Pa. 67, 70; a statement wholly inappropriate when speaking of cases arising under Article IX section 1. In respect to these it has been well said: "In short, the Constitution having delegated to the legislature the power to classify persons and property for purposes of taxation it may select any reasonable basis upon which to make the classification, and may create as many classes as it may in its discretion decide upon, subject always to the limitation that it must exercise good faith and must not make arbitrary and unjust distinctions": *White on the Constitution of Penna.* 379-380. It follows that if anthracite coal can, from any reasonable standpoint, form a class in and of itself, the legislative power to so tax it is uncontrollable by the courts. Probably this conclusion would not be challenged by any one; but it is attempted to be frittered away by arguments now to be considered.

With a wealth of reiteration, we are told "coal is coal, and all must be taxed or none may be taxed"; to which we may answer "land is land," "ice is ice," and "gas is gas," but no one doubts the legislative power to differently tax seated and unseated land, natural ice and artificial ice, and natural gas and manufactured gas. The error in this oft-repeated claim arises from overlooking the fact that names are but a human device for designating things, the thing, not the name for it being the important matter; hence the mere designation of both bituminous and anthracite as coal, cannot alone operate to prevent the legislature from classifying them for
 228 the purpose of taxation. Surely no argument is needed to sustain this conclusion, but it may be asked, if anthracite coal, bituminous coal, cannel coal and charcoal must always

be in the same taxable class, because "coal is coal," could they be taxed separately if the word coal was omitted from their names and they were called anthracite, bitumose, cannelite and chardwood?

We are told also, and the point is strongly presented, that the chemical constituents of anthracite and bituminous coal are much alike, as are also some of the processes of nature which brought each of them into existence; but neither one nor both of these facts conclude the question under review. Pursuing to its logical conclusion the line of inquiry thus suggested, we find that the ascending grade from wood to lignite, cannel coal, bituminous coal, anthracite, and, finally, to graphite or diamonds, is only the further carrying on of the same chemical reactions, resulting principally in the formation and expulsion of more and more of the hydro-carbons and other gases; lignite being wood with some of them expelled, anthracite coal being wood with most of them gone, and graphite and diamonds being wood with practically all of them eliminated. So, also, coke is anthracite coal in all essential respects; in the former man having expelled these gases by the artificial application of heat; in the latter nature eliminating them by heat, largely generated through pressure, during the great cataclysms which resulted in a reasonably stable world. Despite these similarities, probably all would agree that diamonds can be taxed although anthracite coal is not, as can the latter although wood and coke are not; and this was the principle stated in *Commonwealth v. Delaware Division*

Canal Co., 123 Pa. 594, 621: "Nor is classification necessarily
229 based upon any essential differences in the nature or, indeed, the condition of the various subjects; it may be based as well upon the want of adaptability to the same methods of taxation, or upon the impracticability of applying to the various subjects the same methods, so as to produce just and reasonably uniform results, or it may be based upon well-grounded considerations of public policy."

Recognizing this in part, appellant admitted, at the bar of this court, that, since only bituminous coal can practically be used for the manufacture of coke, so much thereof as was in fact used for that purpose could be separately taxed; but claimed that if anthracite is to be taxed it must be in conjunction with so much of the bituminous coal as is used for like purposes. He also says: "Merely competition between two wholly different articles, could not, of itself, bring them within the same 'class of subjects.'" Taken together, these two statements amount to this: the legislature may classify, however alike the articles may be, if they do not come into competition; it may classify, though they come into competition, provided they are not alike; but if they are alike and also come into competition, it may not classify; that is, a "class of subjects," in the constitutional sense, is one in which the articles are not only alike but are competitive. If this contention was sustained then natural ice and artificial ice would have to be taxed similarly or left untaxed, natural gas and manufactured gas would have to be treated in the same way, and doubtless many other subjects of taxation would be unnecessarily yoked together. Reasonably applied,

the rule stated might furnish an easy method to guide the general assembly, but the courts cannot found their decisions upon it alone, since the constitution does not so provide, but, on the contrary, gives to the legislature the right to determine the principles upon which the classification shall be made, and to the courts the right to interfere only when the course pursued results, not in classification but merely in arbitrary separation.

Moreover, as applied to the matter under consideration, any attempt to thus divide bituminous coal into two classes would result in disaster. The tax could not be levied at the mines, unless there was also a provision for refunding in case the coal was not afterwards used in the manufacture of coke; and even this would be ineffective to sustain the tax, so far as relates to that great part of the coal which is shipped in inter-state or foreign commerce; for, as soon as it starts on its journey, it is beyond the taxing power of the State: *Phila. & Reading Ry. Co. v. Hancock*, 253 U. S. 284; *McNeill v. Director General of Railroads*, 272 Pa. 525. Relying upon, but apparently misapprehending this legal principle, appellants argued in the court below that the Act of 1921 was unconstitutional, because a large part of the anthracite coal would be shipped ultimately in interstate or foreign commerce, though the tax was imposed before the journey was even begun; a contention not made orally and but briefly referred to in appellants' paper book here, possibly because of *Crescent Cotton Oil Co. v. State of Mississippi*, decided by the Supreme Court of the United States on November 14, 1921.

Moreover the contention upon this point, practically considered, asks us to reverse the legislature on a disputable question of fact, viz: Has the new uses to which bituminous coal may now be put, carried it into a separately taxable class? When anthracite coal was first ascertained to be available for domestic and manufacturing purposes, it found wood in practical possession of the field. For some time the former entered but slightly in competition with the latter; now, in this State at least, the former is but little used for those purposes. When then, under this contention, did the competition become sufficiently great to allow classification between wood and coal used for domestic purposes?, and what tribunal was to decide this, the legislature or the courts? Admittedly bituminous coal is used in the manufacture of coke, and anthracite coal, practically considered, cannot be; and admittedly also the smaller sizes of anthracite coal come in competition with bituminous coal in the manufacture of steam for industrial uses, and to a minor degree for heating purposes. Can the courts rightfully say that the time has not yet come when, despite the former and because of the latter, the legislature may not classify under the general power given to it?, or can they rightfully say to it, you may not exercise the power to classify until a greater percentage of bituminous coal is used in the manufacture of coke than the percentage of anthracite coal used in the manufacture of steam?; and if they may do this, where must they draw the line in order not to encroach on legislative power? It is perhaps not possible for us to so answer these questions as

to cover all cases which may arise, nor is it necessary that we should. In *Commonwealth v. Delaware Division Canal Co.*, 123 Pa. 594, 622, we said: "Classification for purposes of taxation, as a general rule, is a matter for the legislature; it is the uniformity of taxation, according to that classification, which is for the courts". In *Sharpless v. Phila.*, 21 Pa. 147, 164; and in *Speer v. School Board etc., of Blairsville*, 60

Pa. 158, we said; "We can declare an Act of Assembly void, only when it violates the constitution clearly, palpably, plainly, and in such manner as to leave no doubt or hesitation in our minds. So also in *Pennsylvania R. R. Co., v. Ewing*, 241 Pa. 581, 589, and in *Mahon v. Pennsylvania Coal Co.*, (not yet reported) we quoted with approval the following language from *Chicago, Burlington & Quincy R. R. Co., v. McGuire*, 219 W. 549: "The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and an earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."

If we permitted ourselves to declare that the legislature could only form classes for the purposes of taxation, by putting into each class all things which in their use were not substantially competitive, we would not only seriously impair its constitutional right to classify, but would probably also eliminate many of the objects of taxation. For instance, would the fact of their general use for clothing, prevent silk and velvet being taxed without adding also cotton goods and gingham, or broadcloth without also taxing palm beach suitings? If they did the silk, velvet and broadcloth would doubtless escape because of serious objections against taxing the cheaper materials.

Illustrations such as the foregoing could probably be indefinitely multiplied, bricks and stones used for building, slate and shingles used for roofing, mahogany and pine used for furniture, plated ware and solid silver used on the table, etc., etc.

In the light of these considerations we can only hold, as already stated, that, so far as concerns the classes into which articles may be arranged for purposes of taxation, the matter is one for the legislature and not for the courts; and the latter not only have no duty to classify but they are and should be forbidden to interfere with the legislative classification unless they can say with certainty that it is purely illusory, clearly intended as an evasion of the constitution. It is not so in the present case; on the contrary we have findings of undisputed facts showing a wide difference in the character of these coals and the uses to which they are put; that the people, through the separate branches of their government, state and national, have long treated them as different articles, to be separately classified, needing the protection of government in different ways and to different degrees; and hence the legislature has the power to classify them for the purpose of taxation, to the appropriate end that

where governmental care is most required the burdens of government shall bear heaviest. These undisputed findings may be summarized as follows:

"Anthracite coal differs from bituminous coal in the following physical properties: The amount of fixed carbon, the amount of volatile matter, color, lustre and structural character. The percentage of fixed carbon in anthracite coal is much higher, and the percentage of volatile matter is much lower than in bituminous coal. Anthracite coal is hard, compact and comparatively clean and free from dust and is commonly termed 'hard coal', while bituminous coal is very much less hard, and is dusty and dirty and is commonly termed 'soft coal' (hence) bituminous coal burns with more or less smoke while anthracite coal burns with practically no smoke.

234 "The fuel ratio * * * of bituminous coal differs from that of anthracite coal; as the fuel ratio of bituminous coal rises the coal is more soft, as the fuel ratio of anthracite coal rises the coal is more hard.

"Sixty-one per cent of anthracite coal produced in Pennsylvania is used for domestic purposes and substantially all anthracite coal is used for fuel in the production of heat for domestic purposes and of steam for domestic purposes and for power; but bituminous coal is used not only for fuel but as a raw material from which a great number and variety of commercial products are manufactured.

"A small percentage of anthracite produced in Pennsylvania is used in the production of gases, known as water-gases and producer-gas. Said gases, which are also produced from coke, are of a different character from that produced from bituminous coal (the latter), known as coal gas, is produced from the volatile matter in said coal; (In addition) a large amount of bituminous coal produced in Pennsylvania is used in the production of gas for fuel and illumination in addition to the gas produced in connection with the manufacture of coke.

"Methods of eliminating impurities from bituminous coal are being developed, whereby the percentage of the Pennsylvania bituminous coal available for the manufacture of marketable coke is increasing. Recent experiments in by-product ovens indicate 235 that practically all the bituminous coal in Pennsylvania will be available for the manufacture of marketable coke when the elimination of high sulphur and high phosphorus has been accomplished.

"The gas liberated in the manufacture of coke by the by-product process is saved and used for fuel and illumination and, with some resultant chemical changes and by distillation and condensation, volatile matter is recovered in the form of tar or pitch, ammonia (used largely in the manufacture of fertilisers), cyanide and benzol, and other oils used to generate power by internal combustion and for other purposes."

Much of the tar and pitch so recovered is used in surfacing highways, but from a large part thereof there are extracted, by various processes, fourteen or more separate articles of commerce and

hundreds of medicinal and other products in common which, though it is possible to "extract them from anthracite, cannot be produced therefrom in quantities rendering such production commercially practicable and none are in practice, produced therefrom."

For more than sixty years congress has taxed anthracite and bituminous coal differently, as has the Canadian parliament for upwards of thirty-five years; and the general assembly of this State has repeatedly legislated for the two classes separately, as well as regarding the regulation of mining as the weights at which the coal may be sold (see Acts May 18th, 1878, P. L. 67; June 2nd, 1891, P. L. 176; June 26th, 1895, P. L. 334; June 9th, 1911, P. L. 755; May 27th, 1921, P. L. 1198); as a result of these and other factors relating to market value, "the price of anthracite coal on cars at the mine is ordinarily much larger than the price of bituminous coal on cars at the mine, the difference resulting largely from difference in rates of royalty and cost of production and preparation for market."

It is, of course, true, as pointed out in *Commonwealth v. Alden Coal Co.*, 251 Pa. 134, 141-2, that a difference in price would not alone justify a separate classification; but when it appears that the price varies because of the causes above pointed out, and that the histories of the two kinds of coal are essentially different, during some of the time before and much of the time after man seeks to reduce them to possession, surely the courts could not properly say that their separate classification "violates the Constitution clearly palpably, plainly and in such manner as to leave no doubt or hesitation in our minds."

Indeed it is difficult, if not impossible, to understand how we could rightfully assert the legislature is powerless to classify these two coals for the purpose of taxation, and yet approve, as we have done, (*Mahon v. Pennsylvania Coal Co.*, not yet reported) a classification of the two industries for the purpose of enforcing a great public policy applicable to one but not to the other, and providing penalties and a means for enforcing that policy. This fact alone would seem to show that such great differences exist in relation to the subject as to prevent the courts from saying, as a matter of law, that the two commodities are in all respects alike. The only answer attempted is thus set forth in *Commonwealth v. Alden Coal Co.*, supra: "In determining whether legislative classification is special and discriminatory, regard must be had to the purpose for which the legislation is designed. Differences which make classification for some purposes proper, may furnish no reasonable basis for classification for other purposes; it is their relation to the end proposed by the particular legislation that determines whether the classification is warranted." This language,—applicable to the inferred right to classify the subjects specified in Art. III section 7, rather than to the admitted power under Art. IX section 1, was said, moreover, before the passage of the Act of May 27th, 1921, P. L. 1198, and our decision sustaining the legislative classification there made; wholly overlooks the fact that the power to

classify, under Article IX section 1, is not limited to cases where the commodities are unlike or are not competitive, but, on the contrary, may be based on other grounds, and the courts cannot justly interfere with it, where, as here, "the classification is not an arbitrary one, but one which actually exists in the business world." *Commonwealth v. Lehigh Valley Railroad Co.*, 244 Pa. 241, 248.

It is further alleged the Act violates Article III section 7 of the Constitution in that it is local and special legislation; we agree with appellant that this point is "covered by the foregoing argument on uniformity of taxation," and hence it need not be repeated.

It is claimed also that the Act violates the commerce clause of the Federal Constitution; a sufficient answer to which is the opinion of the Supreme Court of the United States in *Crescent Cotton Oil Co. v. State of Mississippi*, already referred to. It is finally contended that the statute does not give to appellant the "equal protection of the laws" guaranteed to him by the 14th Amendment to the Constitution of the United States; a complete answer to which is the following quotation from *District of Columbia v. Brooke*, 214 U. S.

138, 150; "We have repeatedly decided—so often that a citation of the cases is unnecessary that it does not take from the states the power of classification, and also that such classification need not be either logically appropriate or scientifically accurate. The problems which are not in the government of human beings are different from those involved in the examination of the objects of the physical world, and assigning to them their proper associates. A wide range of discretion, therefore, is necessary in legislation to make it practical, and we have often said that the courts cannot be made a refuge from ill-advised, unjust or oppressive laws."

The decree of the court below is affirmed and the appeal is dismissed at the cost of appellant.

The Chief Justice and Justice Kephart dissent.

239 (Endorsement:) 233. In the Supreme Court of Pennsylvania for the Middle District. No. 15, May Term, 1922. *Roland C. Heisler, Appellant, v. Thomas Colliery Company et al.* Appeal from a Decree of the Court of Common Pleas of Dauphin County. Argued April 17, 1922. Filed in Supreme Court Jun. 24, 1922. Philadelphia. Decree affirmed and appeal dismissed at the cost of appellant. Simpson, J. The Chief Justice and Justice Kephart dissent.

240 *Dissenting Opinion of the Supreme Court of Pennsylvania
by Moschaisker, C. J.*

(233.)

In the Supreme Court of Pennsylvania, Middle District, May Term
1922.

No. 15.

ROLAND C. HEISLER, Appellant,

v.

THOMAS COLLIERY COMPANY et al.

Appeal from a Decree of the Court of Common Pleas of Dauphin
County.

Dissenting Opinion.

MOSCHAISEKER, C. J.:

That the great Commonwealth of Pennsylvania should levy the tribute, on those within and without her borders, which indirectly will result from the taxing act now before us, is, in my opinion, a matter for regret; but, disregarding this, I dissent from the view of the majority, sustaining the legislation, solely on the ground that, while some important differences between the present statute and the one previously declared unconstitutional (Com. v. Alden Coal Co. 251 Pa. 134) may be suggested, yet, on the controlling point upon which we rested our former decision, the two acts are in practical accord. When the other case was here, I reached the deliberate conclusion, stated by Mr. Justice Stewart, for the court (p. 142), that, if coal were to be taxed, there could be no valid classification between anthracite and bituminous; nothing has been brought forward since to change that conclusion. The fact that, for numerous other purposes, such as operating the mines, etc., classification between the two sorts of coal has been permitted, is beside the question: men and women may be classified separately for many legislative purposes, but when it comes to taxing them, differentiation is undoubtedly forbidden; so with coal. To my mind, the several kinds of coal can no more be separated for purposes of taxation than could the different kinds of grain; the state might tax grain, but, surely, it could not legally tax wheat and exempt barley.

In addition, notwithstanding my respect for the view of the writer of the majority opinion, I cannot agree with his statement that "stare decisis has no real place in constitutional law;" this thought, being unnecessary to the decision in hand, ought
241 to be taken as his idea alone. The doctrine in question, while not always deemed controlling (and perhaps not so in

the instant case), cannot be put aside as a principle of law when considering fundamental points; my idea of the limitations on it in that field will be found expressed in *Luzerne County v. Morgan*, 263 Pa. 458, 465, but that *stare decisis* has long been recognized as occupying a "real place" in American constitutional jurisprudence is shown by many decisions in all jurisdictions.

Again, I do not think the words which the writer of the majority opinion "interpolates" into the quotation from *Marbury v. Madison* "appropriate". As I understand the governing principle, when a prior decision is overruled,—although, to avoid injustice, certain rights and positions, assumed on the faith thereof, may remain undisturbed—the theory is that such decision, being in error, never was law; not that it was the law and the court changes it: *Ray v. Natural Gas Co.*, 138 Pa. 576, 590; *Harbor v. Beaver Falls Boro.*, 188 Pa. 263, 265-66. The latter theory would make courts creators, rather than interpreters, of the law, a position they never were intended to occupy.

I believe the act of 1921 to be unconstitutional, and would so declare it, hence this dissent.

242 (Endorsement:) 233. In the Supreme Court of Pennsylvania Middle District. No. 15, May Term, 1922. Roland C. Heisler, Appellant, v. Thomas Colliery Company et al. Appeal from a Decree of the Court of Common Pleas of Dauphin County. Argued April 17, 1922. Dissenting Opinion, Moschizsker, C. J. Filed ———, ———. Filed in Supreme Court Jun. 24, 1922. Philadelphia.

243 *Dissenting Opinion of the Supreme Court of Pennsylvania, by Kephart, J.*

In the Supreme Court of Pennsylvania, Middle District, May Term, 1922.

No. 15.

ROLAND C. HEISLER, Appellant,

v.

THOMAS COLLIERY Co. et al.

Appeal from a Decree of the Court of Common Pleas of Dauphin County.

Dissenting Opinion.

KEPHART, J.:

It is because of the importance of this case that I record my dissent. This court, in *Com. v. St. Clair Coal Co.*, 251 Pa. 159, passed on the same questions now involved, and declared the act then before us to be unconstitutional; I feel bound by that decision for the

following reasons: It is my opinion the court, as it was at that time composed, had before it all the facts now urged to sustain the present bill; and, if it did not have them, they were easily obtainable, for the uses of the different coals enumerated as controlling in the instant majority opinion had then been in actual existence in this country for some time. The court there considered the matters above referred to as thoroughly as we are now considering them. Like any other case, "all relevant facts and issues directly connected with the subject-matter of the litigation * * * might properly have been offered in the prior case: "State Hospital for Criminal Insane v. Consolidated Water Supply Co., 267 Pa. 29, 37; and all issues entering into the governing point are there determined: Allen v. Int. Textbook Co., 201 Pa. 579, 582. The reasons given to sustain the conclusion of the court in the former case are not erroneous or out of harmony with the constitution that we can declare they were error. I cannot discover additional ground on which to rest a contrary view.

For the reasons given, I would apply the law of the former case and hold the present act unconstitutional.

244 (Endorsement:) 233. In the Supreme Court of Pennsylvania, Middle District. No. 15, May Term, 1922. Roland C. Heisler, Appellant, v. Thomas Colliery Company et al. Appeal from a Decree of the Court of Common Pleas of Dauphin County. Argued April 17, 1922. Dissenting opinion. Filed in Supreme Court Jun. 24, 1922. Philadelphia. Kephart, J.

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Petition for Writ of Error.

In the Supreme Court of Pennsylvania for the Middle District, May Term, 1922.

No. 15.

ROLAND C. HEISLER, Appellant,

VS.

THOMAS COLLIERY COMPANY, E. HERBERT SUENDER, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Appellees.

Petition for Writ of Error.

To the Honorable the Chief Justice and Justice of the Supreme Court of the United States:

And now comes Roland C. Heisler and represents that on the twenty-fourth day of June, 1922, a final decree was duly entered by

the Supreme Court of Pennsylvania affirming the decree of the Court of Common Pleas of Dauphin County in a suit in equity, wherein Roland C. Heisler was plaintiff and Thomas Colliery Company; E. Herbert Suender, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, were defendants, and awarding costs in favor of said defendants.

That this was a suit by your petitioner, on his own behalf as a stockholder of Thomas Colliery Company, and on behalf of all other stockholders who might join in the suit, against said
246 Company, its superintendent and directors, and against the Auditor General and the State Treasurer of the Commonwealth of Pennsylvania, to restrain the enforcement of the Act of Assembly of Pennsylvania of May 11, 1921, Pamphlet Laws, page
479, imposing a state tax on anthracite coal.

And your petitioner avers that under the admitted facts in this suit it was shown that approximately 80 per centum of the total production of anthracite coal is shipped, sold and used as fuel outside of the Commonwealth of Pennsylvania; and that of the anthracite coal prepared for market by the Thomas Colliery Company, defendant in this suit, approximately 67 per centum is sold and shipped outside of the Commonwealth of Pennsylvania and a considerable proportion is sold and shipped to foreign countries. The said Act of Assembly of Pennsylvania of May 11, 1921, imposes a tax of $1\frac{1}{2}$ per centum of the value of the coal when "ready for shipment or market." Since, therefore, the said tax is not on the coal in the ground but only after the coal has been separated from the real estate and become an article of commerce, and after 80 per centum of the total production thereof is destined for transportation to points outside of Pennsylvania, (and on the authority of the decisions of your Honorable Court in the cases of Eureka Pipe Line Co. vs. Hallanan, and United Fuel Gas Co. vs. Hallanan, U. S. Supreme Court Advance Opinions, Jan. 16, 1922, page 127, 130), your petitioner, in his bill of complaint, expressly charged that said Act of Assembly was unconstitutional in that it violated Clause 3 of
247 Section 8 of Article I of the Constitution of the United States which provides that Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian Territories.

Your petitioner further avers that it was an admitted fact in this suit that the total production of anthracite coal is sold in competition with bituminous coal in the general fuel market and approximately 30 per centum thereof, representing steam sizes of anthracite coal, is sold in direct competition with bituminous, semi-bituminous and semi-anthracite grades of coal in the fuel markets, both in Pennsylvania and outside of Pennsylvania; that approximately 10 per centum is pea coal which also competes directly with bituminous coal. By reason of the fact that the said Act of Assembly imposes

a tax on anthracite coal only, your petitioner in his bill of complaint expressly charged that said Act of Assembly was unconstitutional in that it deprived your petitioner of his property without due process of law and denied to him the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States.

Wherefore your petitioner prays that a writ of error from the Supreme Court of the United States may issue in this case to the Supreme Court of Pennsylvania for the correction of errors so complained of and that a transcript of record, proceedings, and papers in this cause duly authenticated by the Prothonotary of the Supreme Court of Pennsylvania may be sent to the Supreme Court of the United States as provided by law.

Dated, Philadelphia, Pennsylvania, the 12 day of July, 1922.

REESE H. HARRIS,
HENRY S. DRINKER, JR.,
FRANK W. WHEATON,

Attorneys for Petitioner and Plaintiff-in-Error.

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Order.

After consideration of the foregoing petition for writ of error, it is hereby ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered herein, be, and the same is hereby allowed, and that a certified transcript of the record, proceedings and papers in this cause be forthwith transmitted to the Supreme Court of the United States. It is further ordered that the bond on appeal be fixed at the sum of \$10,000.

Dated, July 12, 1922.

ROBT. VON MOSCHZISKER,
Chief Justice of the Supreme Court of Pennsylvania.

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(Endorsement:) No. 15, May Term, 1922. In the Supreme Court of Pennsylvania for the Middle District. Roland C. Heisler, Appellant, v. Thomas Colliery Company, E. Herbert Suender, Superintendent of Thomas Colliery Company, John Gilbert, Jesse W. Powell, Laurence Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company, Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Appellees. Petition for Writ of Error Order. Filed in Supreme Court Jul. 12, 1922. Philadelphia. Reese H. Harris, Henry S. Drinker, Jr., Frank W. Wheaton, Attorneys for Petitioner and Plaintiff-in-Error. Dickson, Beitler & McCouch, Attorneys-at-Law, No. 750 Bullitt Bldg., Philadelphia.

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Bond on Writ of Error.

Know all men by these presents, That we, Roland C. Heisler, as principal, and American Surety Company of New York, as sureties, are held and firmly bound unto Thomas Colliery Company, E. Herbert Suender, John Gilbert, Jesse W. Powell, Laurence Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Samuel S. Lewis

and Charles A. Snyder in the full and just sum of Ten thousand (\$10,000) dollars, to be paid to the said Thomas Colliery Company, E. Herbert Suender, John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Samuel S. Lewis, and Charles A. Snyder, their certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 18th day of July, in the year of our Lord one thousand nine hundred and twenty-two.

Whereas, lately at a Term of the Supreme Court of Pennsylvania for the Middle District, May Term, 1922, No. 15 in a suit depending in said Court, between Roland C. Heisler, plaintiff, and Thomas Colliery Company, E. Herbert Suender, Superintendent of Thomas Colliery Company, John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company, Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, 251 State Treasurer of the Commonwealth of Pa., Defendants, a decree was rendered against the said Roland C. Heisler and the said Roland C. Heisler having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said Thomas Colliery Company, E. Herbert Suender, John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Samuel S. Lewis and Charles A. Snyder citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Roland C. Heisler shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

ROLAND C. HEISLER. [SEAL.]
AMERICAN SURETY COMPANY

OF NEW YORK,

By R. R. BENEDICT.

R. R. BENEDICT, [SEAL.]

Resident Vice President.

[Seal of American Surety Company of New York.]

Sealed and delivered in presence of

EDWIN S. DIXON, Jr.

E. C. RIEBEN.

B. JACOBS.

Attest:

FALLER SPREEMAN.

FALLER SPREEMAN,

Resident Asst. Secretary.

665,958A.

Approved by—

*Associate Justice of the Supreme
Court of the United States.*

Approved by—

ROBT. VON MOSCHZISKER,
Chief Justice of Pennsylvania.

252 (Endorsement:) No. 15, May Term, 1922. Supreme Court of Pennsylvania for the Middle District. Roland C. Heisler, Plaintiff, and Thomas Colliery Company et al., Defendants. Bond on Writ of Error. Filed in Supreme Court, Jul. 22, 1922. Middle District.

253 Form G 337—30M 1-22.

Authority of Signers for Surety.

Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.

The first meeting of the Board of Trustees of the American Surety Company of New York, after the annual stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 17, 1922, at twelve o'clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees, American Surety Company of New York.

"GENTLEMEN:

"The Committee appointed by the Executive Committee of this Company, at their meeting held Tuesday, November 29, 1921, for the purpose of nominating * * * Officers of the Company, * * * for the ensuing year and until their successors are elected, beg leave to report as follows:

"We nominate for * * *

Place.	Resident vice presidents.	Resident assistant secretaries.
Philadelphia, Pa.	Samuel S. Sharp.	Robert R. Benedict.
	Robert R. Benedict.	M. E. Neville.
	Carl B. Weed.	A. C. Robinson.
	Jos. A. Mackle.	Carl B. Weed.
	Foster Hale.	Jos. A. Mackle.
	Robert T. Rouse.	Foster Hale.
		Frank L. Mueller.
		H. K. Budd.
		Faller Spreeman.
		Robert T. Rouse.
		E. C. Rieben.

* * * * *

254 "Whereupon, it was

Resolved, That the Secretary be authorized to cast one ballot on behalf of the Trustees present, for the members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.

"The following resolution was adopted:

"Resolved, That the Resident Vice Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by a Resident Assistant Secretary."

* * * * *

255 STATE OF NEW YORK,
County of New York, ss:

I, W. H. Riley, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 19th day of January, 1922.

[Seal of American Surety Company of New York.]

W. H. RILEY,
Assistant Secretary.

Assignment of Errors.

In the Supreme Court of the United States.

In the Supreme Court of Pennsylvania, May Term, 1922.

In Equity.

No. 15.

ROLAND C. HEISLER, Plaintiff in Error,

VS.

THOMAS COLLIERY COMPANY, E. HERBERT SUENDER, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants in Error.

Error to Supreme Court of Pennsylvania.

Assignment of Errors.

And now comes Roland C. Heisler, Petitioner and Plaintiff in Error by his Attorneys, and in connection with his petition for a writ of error files the following assignment of errors upon which he will rely upon his prosecution of the appeal in the above entitled cause, from the decree made by the Supreme Court of Pennsylvania on the twenty-fourth day of June, 1922.

I.

The Court erred in holding that the Act of Assembly of the Commonwealth of Pennsylvania entitled "An Act imposing a State tax on anthracite coal; providing for the assessment and collection thereof; and providing penalties for the violation of this Act," approved May 11, 1921, was constitutional and did not violate the Fourteenth Amendment to the Constitution of the United States, which provides that:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

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II.

The Court erred in holding that the Act of Assembly of the Commonwealth of Pennsylvania entitled "An Act imposing a State tax on anthracite coal; providing for the assessment and collection thereof; and providing penalties for the violation of this Act," approved May 11, 1921, was constitutional and did not violate Clause 3 of Section 8 of Article I of the Constitution of the United States, which provides that:

"Congress shall have the power to regulate Commerce with foreign nations and among the several states and with the Indian Territories."

III.

The Court erred in holding that the Act of Assembly of the Commonwealth of Pennsylvania entitled "An Act imposing a State tax on anthracite coal; providing for the assessment and collection thereof; and providing penalties for the violation of this Act," approved May 11, 1921, was constitutional and did not violate Clause 5 of Section 9 of Article I of the Constitution of the United States which provides that:

"No tax or duties shall be laid on articles exported from the State."

By reason whereof, this petitioner and plaintiff in error prays that the said decree of the Supreme Court of Pennsylvania may be reversed, and the said Act of Assembly be held unconstitutional.

REESE H. HARRIS,
HENRY S. DRINKER, Jr.,
FRANK W. WHEATON,
Attorneys for Plaintiff in Error.

258 (Endorsement:) No. 15, May Term, 1922. In the Supreme Court of Pennsylvania. Roland C. Heisler, Plaintiff in Error, vs. Thomas Colliery Company, E. Herbert Suender, Superintendent of Thomas Colliery Company, John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company, Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants in Error. Assignment of Errors. Reese H. Harris, Henry S. Drinker, Jr., Frank W. Wheaton, Attorneys for Plaintiff in Error. Filed in Supreme Court Jul. 12, 1922. Philadelphia.

259 *Return to Writ of Error from Supreme Court of the United States and Certificate.*

STATE OF PENNSYLVANIA,
County of Dauphin, ss:

And now, to-wit, August 1st, 1922, the said Roland C. Heisler, having produced to the Supreme Court of Pennsylvania for the Middle District, the Writ of the United States of America for the correcting of errors of and upon the said premises and commanding the record and proceedings aforesaid, of the judgment aforesaid so as aforesaid rendered with all things touching the same, to be transmitted to the Supreme Court of the United States to be held at the city of Washington within thirty days from the date of the writ, to-wit, July 12, 1922, which Writ of Error is hereunto annexed, in pursuance whereof, and according to the form and effect of the Act of Congress in such case made and provided, a transcript of the record and proceedings of the judgment aforesaid, so as aforesaid rendered, with all things relating to the same, together with the said Writ of Error, are hereby transmitted to the Supreme Court of the United States accordingly.

In testimony that the foregoing, contained on pages — to — is a duly certified transcript of the complete record and proceedings in the within entitled case wherein Roland C. Heisler was plaintiff below and Thomas Colliery Company; E. Herbert Suender, 280 Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, were defendants below, with all things concerning the same, I have hereunto subscribed my name and affixed the seal of the said Supreme Court of Pennsylvania for the Middle District, at Harrisburg the day and year just above written.

[Seal of the Supreme Court of Pennsylvania, 1776.]

WILLIAM PEARSON,
Prothonotary of the Supreme Court of
Pennsylvania for the Middle District.

281 *Prothonotary's Certificate to Record.*

COMMONWEALTH OF PENNSYLVANIA,
County of Dauphin, set:

I, William Pearson, Prothonotary of the Supreme Court of Pennsylvania, in and for the Middle District thereof, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct Copy of the whole and entire Record in the case of

Roland C. Heisler, Plaintiff, vs. Thomas Colliery Company, E. Herbert Suender, Superintendent of Thomas Colliery Company, John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company, Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants, at No. 15 of May Term, 1922, as full, entire and complete as the same remains on file in the said Supreme Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record, and of the whole of the original thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court at Harrisburg, in the County of Dauphin, in the said Middle District of Pennsylvania, this 1st day of August in the year of our Lord One Thousand Nine Hundred and twenty-two.

[Seal of the Supreme Court of Pennsylvania, 1776.]

WILLIAM PEARSON,
Prothonotary.

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Chief Justices' Certificate to Prothonotary.

I, Robt. von Moschzisker, Chief Justice of the Supreme Court of Pennsylvania, being the highest court of law or equity of the said State, do certify that William Pearson by whom the annexed record, certificate and attestation were made and given, and who, in his own proper handwriting, thereunto subscribed his name and affixed the seal of the Supreme Court of Pennsylvania, was at the time of so doing and now is Prothonotary in and for the Middle District of said Court, duly commissioned and qualified; to all of whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere, and that the said record, certificate and attestation are in due form of law and made by the proper officer.

[Seal of the Supreme Court of Pennsylvania, 1776.]

ROBT. VON MOSCHZISKER,
Chief Justice of the Supreme Court of Pennsylvania.

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Chief Justice's Certificate to Prothonotary.

COMMONWEALTH OF PENNSYLVANIA,
County of Dauphin, ss:

I, William Pearson, Prothonotary of the Supreme Court of Pennsylvania, in and for the Middle District thereof, do certify that the Honorable Robt. von Moschzisker, by whom the foregoing at-

testation was made, and who has thereunto subscribed his name, was at the time of making thereof and still is Chief Justice of the Supreme Court of Pennsylvania, duly commissioned and qualified to all of whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 1st day of August, A. D. 1922.

[Seal of the Supreme Court of Pennsylvania, 1776.]

WILLIAM PEARSON,
Prothonotary

264 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said appeal before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Roland C. Heisler, v. Thomas Colliery Company; E. Herbert Suender, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company, Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said Roland C.

Heisler, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 12th day of July, in the year of our Lord one thousand nine hundred and twenty-two.

[Seal of the U. S. District Court, M. D. Penna.]

G. C. SCHEUER,
Clerk of the United States District Court.

Allowed by

ROBT. VON MOSCHZISKER,
Chief Justice of the Supreme Court of Pennsylvania.

266 [Endorsed:] Supreme Court of the United States, October Term 191-. Roland C. Heisler, Plaintiff-in-Error, vs. Thomas Colliery Company; E. Herbert Suender, Superintendent of Thomas Colliery Co., et al., Defendants-in-Error. Writ of Error. Filed in Supreme Court Jul. 12, 1922. Philadelphia.

267 In the Supreme Court of Pennsylvania, May Term, 1922.

In Equity.

No. 15.

ROLAND C. HEISLER, Plaintiff in Error,

VS.

THOMAS COLLIERY COMPANY, E. HERBERT SUENDER, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants in Error.

UNITED STATES OF AMERICA, ss:

To the defendants above named, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty days from the date of the service of this citation, pursuant to a writ of error filed in the office of the Prothonotary of the Supreme Court of Pennsylvania in the Middle District, wherein Roland C. Heisler is plaintiff in error and you are defendant-in error, to show cause, if any there be, why the decree rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Witness, the Honorable, the Chief Justice of the Supreme Court of Pennsylvania, this 12 day of July, 1922.

ROBT. VON MOSCHZISKER,
Chief Justice of the Supreme Court of Pennsylvania

268 [Endorsed:] No. 15, May Term, 1922. In the Supreme Court of Pennsylvania. Roland C. Heisler, Plaintiff in Error, vs. Thomas Colliery Company: E. Herbert Suender, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants in Error. Citation. Filed in Supreme Court Jul. 12, 1922. Philadelphia.

And now, to wit, July 17, 1922, service of the within citation is accepted on behalf of the Defendants in Error named therein.

GEO. ROSS HULL,
First Deputy Attorney General of the Commonwealth of Pennsylvania.

269 In the Supreme Court of the United States.

In the Supreme Court of Pennsylvania, May Term, 1922.

In Equity.

No. 15.

ROLAND C. HEISLER, Plaintiff in Error,

VS.

THOMAS COLLIERY COMPANY, E. HERBERT SUENDER, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Harlow Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants in Error.

Error to Supreme Court of Pennsylvania.

Assignment of Errors.

And now comes Roland C. Heisler, Petitioner and Plaintiff in Error by his Attorneys, and in connection with his petition for a writ of error files the following assignment of errors upon which he will rely upon his prosecution of the appeal in the above entitled cause, from the decree made by the Supreme Court of Pennsylvania on the twenty-fourth day of June, 1922.

I.

The Court erred in holding that the Act of Assembly of the Commonwealth of Pennsylvania entitled "An Act imposing a State tax on anthracite coal; providing for the assessment and collection thereof; and providing penalties for the violation of this Act," approved May 11, 1921, was constitutional and did not violate the Fourteenth Amendment to the Constitution of the United States, which provides that:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

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II.

The Court erred in holding that the Act of Assembly of the Commonwealth of Pennsylvania entitled "An Act imposing a State tax on anthracite coal; providing for the assessment and collection thereof; and providing penalties for the violation of this Act," approved May 11, 1921, was constitutional and did not violate Clause 3 of Section 8 of Article I of the Constitution of the United States, which provides that:

"Congress shall have the power to regulate commerce with foreign nations and among the several states and with the Indian Territories."

III.

The Court erred in holding that the Act of Assembly of the Commonwealth of Pennsylvania entitled "An Act imposing a State tax on anthracite coal; providing for the assessment and collection thereof; and providing penalties for the violation of this Act," approved May 11, 1921, was constitutional and did not violate Clause 5 of Section 9 of Article I of the Constitution of the United States which provides that:

"No tax or duties shall be laid on articles exported from the State."

By reason whereof, this petitioner and plaintiff in error prays that the said decree of the Supreme Court of Pennsylvania may be reversed, and the said Act of Assembly be held unconstitutional.

REESE H. HARRIS,
HENRY S. DRINKER, Jr.,
FRANK W. WHEATON,
Attorneys for Plaintiff in Error.

271 [Endorsed:] No. 15, May Term, 1922. In the Supreme Court of Pennsylvania. Roland C. Heisler, Plaintiff in error, vs. Thomas Colliery Company; E. Herbert Suender, Superintendent of Thomas Colliery Company; John Gilbert, Jesse W. Powell, Laurance Butler, Horatio H. Morris, Robert C. Hill, Hach Voorhees, Directors of Thomas Colliery Company; Samuel S. Lewis, Auditor General of the Commonwealth of Pennsylvania, and Charles A. Snyder, State Treasurer of the Commonwealth of Pennsylvania, Defendants in Error. Assignment of Errors. Reese H. Harris, Henry S. Drinker, Jr., Frank W. Wheaton, Attorneys for Plaintiff in Error. Filed in Supreme Court Jul. 12, 1922. Philadelphia.

Endorsed on cover: File No. 29,091. Pennsylvania Supreme Court. Term No. 541. Roland C. Heisler, plaintiff in error, vs. Thomas Colliery Company, E. Herbert Suender, superintendent, John Gilbert et al., &c., et al. Filed August 10th, 1922. File No. 29,091.

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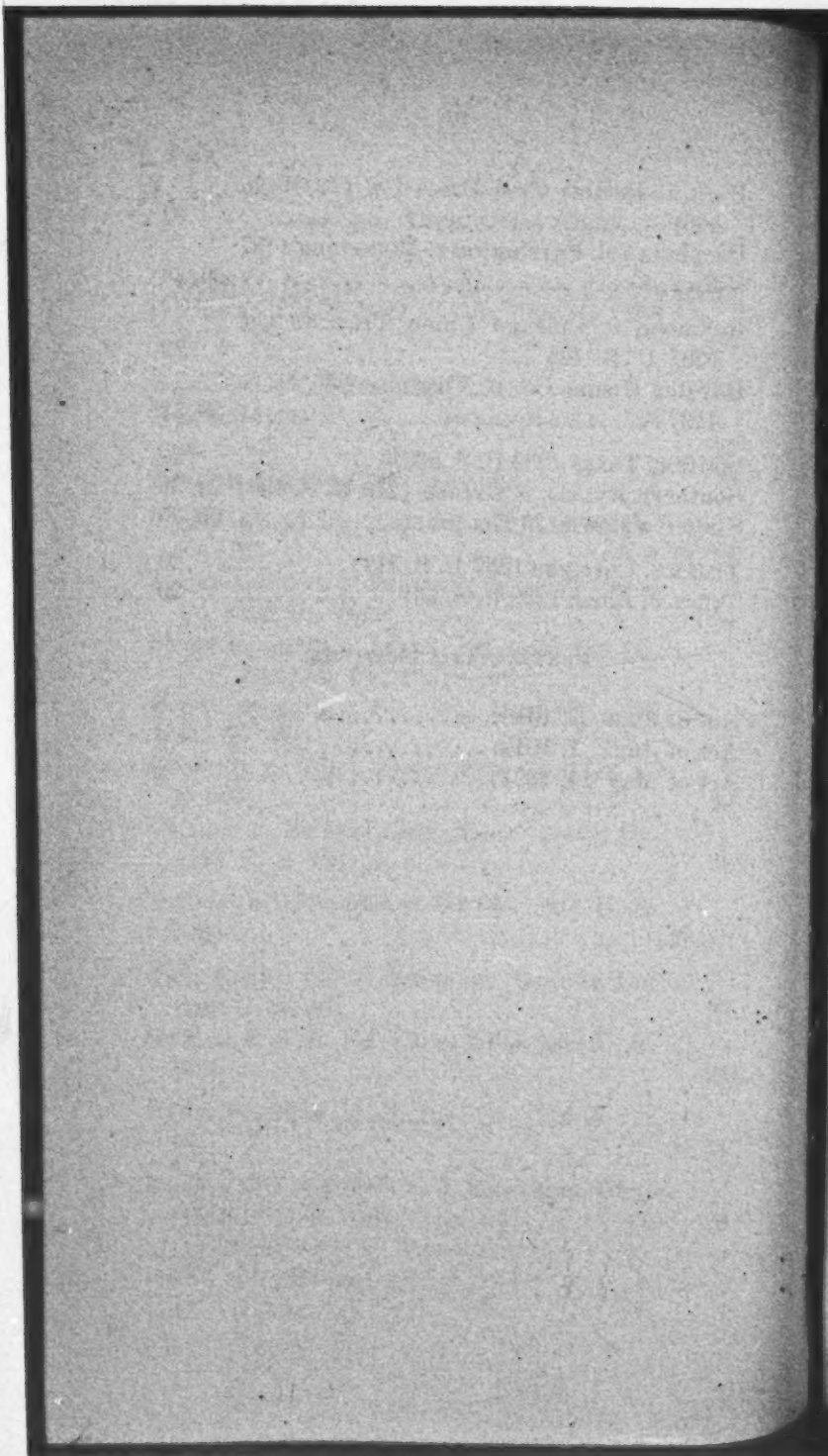
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Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 541.

ROLAND C. HEISLER,
Plaintiff in Error,

against

THOMAS COLLIERY COMPANY, E.
Herbert Suender, Superinten-
dent of Thomas Colliery Com-
pany; John Gilbert and others,
Directors of Thomas Colliery
Company; Samuel S. Lewis,
Auditor General of the Com-
monwealth of Pennsylvania,
and Charles A. Snyder, State
Treasurer of the Common-
wealth of Pennsylvania.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
PENNSYLVANIA.

POINTS FOR PLAINTIFF IN ERROR.

This case comes to this Court on a writ of error allowed by the Chief Justice of the Supreme Court of Pennsylvania, to review a final decree rendered on June 24, 1922, by the Supreme Court

of Pennsylvania, which affirmed the decree of the Court of Common Pleas of Dauphin County dismissing the bill of complaint filed by the plaintiff in error on his own behalf and as a stockholder of Thomas Colliery Company, instituted for the purpose of testing the constitutionality of an act of the General Assembly of Pennsylvania of May 11, 1921, imposing a State tax on anthracite coal (*Rec.*, pp. 144-154).

The Statute Here Involved, and the Previous Acts which were Declared Unconstitutional.

The act in question, No. 225, is to be found in the Pamphlet Laws of Pennsylvania for 1921 at page 479. It is entitled "An Act imposing a State tax on anthracite coal; providing for the assessment and collection thereof; and providing penalties for the violation of this act."

The only section necessary to be considered is the first, which reads as follows:

"Section 1. Be it Enacted, etc., That from and after the passage of this act, each and every ton of anthracite coal, of the weight of two thousand two hundred and forty (2,240) pounds avoirdupois, mined, washed, screened, or otherwise prepared for market in this Commonwealth, shall be made subject to a tax of one and one-half per centum ($1\frac{1}{2}\%$) of the value thereof when prepared for market, which said tax shall be assessed at the time when said coal has been mined, washed or screened, and is ready for shipment or market."

Two previous acts on the same subject had been passed by the General Assembly of Pennsylvania, the first on June 27, 1913 (P. L. 539), which provided:

"That hereafter every ton of anthracite coal of the weight of two thousand two hundred and forty (2,240) pounds avoirdupois prepared for market, in the Commonwealth, shall be subject to a State tax of two and one-half per centum ($2\frac{1}{2}\%$) of the value thereof when prepared for market, to be settled and collected as provided by law for other State taxes."

This act was, on October 28, 1915, declared unconstitutional by the Supreme Court of Pennsylvania in *Commonwealth v. Alden Coal Co.*, 251 Pa. St. 134 and *Commonwealth v. St. Clair Coal Co.*, 251 Pa. St. 159.

The second act was passed on June 1, 1915 (P. L. 721), and provided:

"That from and after the passage of this act each and every ton of anthracite coal of the weight of two thousand two hundred and forty (2,240) pounds avoirdupois mined in this Commonwealth shall be subject to a tax of two and one-half per centum ($2\frac{1}{2}\%$) of the value thereof when prepared for market, which said tax shall be assessed at the time when said coal has been mined and is ready for shipment or market."

This act was, in 1917, likewise declared unconstitutional by the Court of Common Pleas of Dauphin County, Pennsylvania, in *Commonwealth vs. Locust Mountain Coal Company*, on the authority of *Commonwealth v. Alden Coal Co.*, *supra*, no appeal being taken to the Supreme Court of Pennsylvania (Rec., p. 61).

The opinion rendered by Judge Kunkel is as follows:

"It is conceded by the Attorney General that the case is ruled by *Com. v. Alden*, 251

Pa. 134. The act of June 1, 1915, P. L. 721, under which the tax is claimed, imposes a tax on anthracite coal and provides for its distribution. It differs not in these respects from the act of June 27, 1913, P. L. 639, which in the case referred to was declared to be violative of Section 1 of Article IX of the State Constitution and void."

The Message of Governor Sproul to the Legislature.

At a joint session of the General Assembly of Pennsylvania held on January 18, 1921, Governor William C. Sproul addressed the Legislature on various topics, including that of revenue, as to which he said:

"If our present revenue could be increased twenty per cent., or, say, by \$10,000,000, great things could be done in line with the progressive ideas which are again strongly impressed upon the minds of our people. There are some ways in which this could be done without hardship to any one and without disarranging the general tax plans of the State.

Perhaps the most practicable plan, in that the slight burden it would impose would be very widely distributed and a large proportion of it would come from beneficiaries of Pennsylvania's natural resources living elsewhere, would be found in a small ad valorem tax upon coal. * * * It will be recalled that a few years ago, an act was passed levying a tax upon anthracite coal, but this enactment was later declared unconstitutional by the Supreme Court because it was discriminatory in its provision that only one kind of coal should be subject to taxation. It will therefore be necessary to include soft coal

production in our plans this time, if we are to take action in this direction.

A small percentage tax upon the value of coal produced at the mine, and which would yield an average of, say, four cents per ton upon bituminous coal and eight cents per ton upon anthracite would, at the present rate of production, yield a gross revenue of about \$16,000,000, so great are our shipments of fuel. The State should retain sixty per cent. of this amount for the benefit of all of the people of the Commonwealth; twenty per cent. should be returned to the counties from which it originates, to relieve local taxation and for permanent improvements, and the remaining twenty per cent. should go into a fund to be administered by a reparations commission or possibly by a bureau in the Department of Public Welfare, which I shall later suggest, to be applied to restorations, repairs, rebuilding and remedying generally the conditions existing in the coal regions."

Instead of following the recommendation of the Governor, that bituminous as well as anthracite coal should be subject to taxation, the Legislature passed the enactment the validity of which is the subject of this litigation. By it a tax was imposed solely on anthracite coal, bituminous and other grades of coal not being subjected to the *ad valorem* tax provided for in the act.

The case came on to be heard on bill and answer. Findings were made by the Court of Common Pleas, and a decision was rendered, sustaining the validity of the act, which was affirmed by the Supreme Court of Pennsylvania, Chief Justice Moschzisker and Mr. Justice Kephart dissenting. The opinions are to be found in *Rec.*, pp. 133 to 143.

As bearing on the validity of the act under review, the following facts, set forth in the bill of

complaint and admitted in the answer, are now brought to the attention of this Court:

Allegations of Bill Admitted by the Answer as to Plaintiff's Status.

The plaintiff is a citizen of Pennsylvania and a stockholder of Thomas Colliery Company, and has brought this action in a representative capacity. The Thomas Colliery Company is a corporation organized under the laws of Pennsylvania with power to own and operate coal mines, and owns and operates an anthracite colliery and coal mines at Shenandoah, Pennsylvania, and washeries for the recovery and preparation of coal and culm from culm banks at Lost Creek, Pennsylvania. A majority of the directors of the corporation prior to the commencement of the action intended to pay without protest to the Commonwealth of Pennsylvania a tax of one and one-half per centum of the value of each and every ton of anthracite coal prepared for market by the company in Pennsylvania. Its superintendent was daily assessing the number of gross tons of anthracite coal mined, washed and screened in the company's mines, washeries and collieries and was fixing the value thereof, and also proposed to file with the Auditor General of Pennsylvania a report as required by the act of May 11, 1921. The Auditor General and the State Treasurer of the Commonwealth proposed to enforce and collect the tax on anthracite coal as prescribed in the act. The plaintiff had requested the corporation and its directors to order its superintendent to cease from making the daily assessments, to refuse to pay them and to contest the

constitutionality of the act, and to apply to a court of competent jurisdiction to determine its liability under the act, but they had refused and continued to refuse to comply with this request. (Allegations of Bill of Complaint, paragraphs 1-7, *Rec.* pp. 7-9; admitted by the answer, *Rec.* p. 16.)

Allegations of Bill Admitted by Answer Regarding Production of Coal in Pennsylvania.

The complaint further alleges in paragraph 8 (*Rec.* p. 9), and the allegation is not denied in the answer:

"The commodity known as coal is a fuel and is found in various grades or qualities in Pennsylvania, the grades being known as anthracite, bituminous, semi-anthracite and semi-bituminous."

The complaint contains the following additional allegations, which are admitted in the answer and were found as facts by the Court (*Rec.* pp. 21, 22):

"10. Anthracite coal is found only in nine counties out of sixty-seven counties in the State of Pennsylvania, viz., Wayne, Susquehanna, Lackawanna, Luzerne, Columbia, Carbon, Schuylkill, Northumberland and Dauphin."

"11. Bituminous coal is found in twenty-four counties of Pennsylvania, viz.: The counties of Allegheny, Armstrong, Beaver, Blair, Bedford, Cambria, Cameron, Centre, Clarion, Clearfield, Clinton, Elk, Fayette, Greene, Huntingdon, Indiana, Jefferson, Lawrence, Lycoming, Mercer, Somerset, Washington and Westmoreland. Semi-anthracite is found in Sullivan County."

"12. The production of anthracite in the

year 1920 was 78,842,000 gross tons; semi-anthracite in Pennsylvania, 479,953 gross tons; bituminous and semi-bituminous in the entire United States, 496,930,000 gross tons, of which 145,000,000 gross tons were produced in Pennsylvania."

"13. The total production of anthracite coal is sold in competition with bituminous coal in the general fuel market and approximately thirty per centum is prepared, shipped and used in what are known as steam sizes (sizes smaller than pea), and these steam sizes are sold in direct competition with bituminous, semi-bituminous and semi-anthracite grades of coal in the fuel markets both in Pennsylvania and outside of Pennsylvania. Approximately ten per cent. is pea coal which also competes directly with bituminous."

"14. Coal in place is assessed at its full value as land and all local taxes levied thereon, to wit, county taxes, township taxes, city taxes, school taxes, road taxes, borough taxes and poor taxes and the Thomas Colliery Company and other local mining corporations pay taxes to the Commonwealth upon capital stock, in which the value of coal lands is considered, in fixing its value."

"15. Of all the said grades of coal found in Pennsylvania a very large proportion is exported to other States and Territories of the United States and to foreign countries. Approximately eighty per centum of the total production of anthracite coal is shipped, sold and used as fuel outside of the Commonwealth of Pennsylvania."

"16. Of the anthracite coal prepared for market by the Thomas Colliery Company, approximately sixty-seven per centum is sold and shipped outside of the Commonwealth of Pennsylvania, and a considerable proportion is sold and shipped to foreign countries."

Paragraphs 17 and 18 of the bill of complaint refer to the decision in *Commonwealth v. Alden Coal Company, supra*, to the facts that between the date of that decision, October 2, 1915, and the passage of the act now under consideration, the Thomas Colliery Company expended upwards of \$100,000 in constructing and adding permanent improvements to its washeries and the facilities immediately connected therewith designed for the recovery and preparation from culm banks of the coal therein of which by far the greater part consists of steam sizes and pea coal which are sold in direct competition with bituminous, semi-bituminous and semi-anthracite grades of coal in the fuel markets both in Pennsylvania and outside of Pennsylvania, and that during such period it expended upwards of \$125,000 in constructing and adding permanent improvements to its coal mines and collieries for the production and preparation for market of fresh mined coal, approximately forty per centum of which consists of pea and smaller sizes, and that during such period the owners, operators and lessees of anthracite coal mines in Pennsylvania have expended upwards of \$30,000,000 for the same purpose.

These allegations are admitted, but their relevancy is denied (*Rec.* pp. 10, 22).

Findings of the Court Relative to Anthracite and Bituminous Coal.

The answer contained a number of allegations which, together with those thus far referred to, are set forth in the findings of the Court (*Rec.* pp. 24-28), the Court, however, having added to

the 12th allegation, in so far as it related to the production of anthracite coal in the year 1920, that all of the anthracite referred to was produced in Pennsylvania (*Rec.* p. 27).

At the request of the defendants the Court made the following additional findings (*Rec.* pp. 37, 41):

"1. The coal sometimes known as semi-bituminous is a grade of bituminous coal higher in its percentage of fixed carbon and lower in its percentage of volatile matter than is ordinarily the case of bituminous coal.

2. The coal sometimes known as semi-anthracite is a low grade of anthracite coal containing some volatile matter and a lower percentage of fixed carbon than is ordinarily the case with anthracite coal.

3. The total quantity of anthracite coal produced in Pennsylvania is about one hundred and sixty-three times the quantity of semi-anthracite coal produced in Pennsylvania.

4. The quantity of semi-bituminous coal produced in Pennsylvania is very small compared with the total amount of bituminous coal produced in Pennsylvania.

5. Anthracite coal differs from bituminous coal in the following physical properties: the amount of fixed carbon, the amount of volatile matter, color, lustre and structural character. The percentage of fixed carbon in anthracite coal is much higher, and the percentage of volatile matter is much lower than in bituminous coal. Anthracite coal is hard, compact and comparatively clean and free from dust and is commonly termed 'hard coal,' while bituminous coal is very much less hard, and is dusty and dirty and is commonly termed 'soft coal.'

6. The fuel ratio (ascertained by dividing the percentage of fixed carbon by the per-

centage of volatile matter) of bituminous coal differs from that of anthracite coal and as the fuel ratio of bituminous coal rises the coal is more soft, and as the fuel ratio of anthracite coal rises the coal is more hard.

7. Substantially all anthracite coal is used for fuel only, but bituminous coal is used not only for fuel but as a raw material from which a great number and variety of commercial products are manufactured.

Except as to structure, the general difference in physical properties between bituminous and anthracite coal is the same as the difference between bituminous coal and coke, a product which is manufactured from bituminous coal.

8. No county in Pennsylvania produces both anthracite and bituminous coal. Wherever one is present in Pennsylvania the other is absent.

9. Both bituminous and anthracite were originally deposits of vegetable matter and have been brought to their present forms by the processes of nature. According to the commonly accepted theory anthracite, however, has been subjected to a process which has not been applied to bituminous, whereby, through the application of heat, a large proportion of the volatile matter has been removed, as it is removed from bituminous coal in the manufacture of coke.

10. The difference between anthracite, a product of nature, and coke, which is produced from bituminous coal by a process of manufacture, consists in the structure, that of coke being cellular, while the pressure to which anthracite has been subjected has rendered it a hard, compact substance.

11. Bituminous coal burns with more or less smoke—most of it with a dense smoke—by reason of which some municipalities impose regulations requiring special appliances to abate the 'smoke nuisance,' while anthra-

cite burns with a practically smokeless flame.

We find that bituminous coal burns with more or less smoke while anthracite burns with practically no smoke. The municipal regulations we think are immaterial.

12. Sixty-one per cent. of anthracite coal produced in Pennsylvania is used for domestic purposes and substantially all anthracite coal is used for fuel in the production of heat for domestic purposes and of steam for domestic purposes and for power.

13. A small percentage of anthracite produced in Pennsylvania is used in the production of gases, known as water-gas and producer-gas. Said gases, which are also produced from coke, are of a different character from that produced from bituminous coal. The gas produced from bituminous coal, known as coal gas, is produced from the volatile matter in said coal, while the said gases produced from anthracite coal are obtained by mixing the carbon of the coal combined with oxygen, in the form of C. O., with nitrogen from the air, to obtain producer-gas, or with hydrogen from superheated water vapor, to obtain water-gas.

14. Bituminous coal is divided into two types—caking and non-caking or splint coal, that is, coals that will intumesce or run together in turning and those which do not run together but remain separate like blocks of wood. Practically all (at least 99 per cent) of the bituminous coal produced in Pennsylvania is of the caking type. This caking property is the foundation of the coking industry. While practically all of the bituminous coal of Pennsylvania is caking coal as aforesaid, not all of it will make commercially acceptable coke because of the percentage of phosphorus or sulphur. Methods of eliminating these impurities are being developed, whereby the percentage of the Pennsylvania bituminous coal available for the manufac-

ture of marketable coke is increasing. Recent experiments in by-product ovens indicate that practically all the bituminous coal in Pennsylvania will be available for the manufacture of marketable coke when the elimination of high sulphur and high phosphorus has been accomplished.

15. In the year 1918 more than one-quarter of the bituminous coal produced in Pennsylvania was used in the manufacture of coke. Later statistics are not available. Of the coal so used, approximately 72 per cent was manufactured into coke by the 'beehive oven process' and approximately 28 per cent by the 'by-product process.' The said beehive process is the old fashioned process and is being rapidly replaced by the by-product process. The said by-product process is usually operated near the place of consumption of the coke, with coal purchased from more than one source, and about one-half the coal produced in Pennsylvania and used in said process in 1918 was so used at points outside the State. Each process eliminates from the coal a large percentage of the volatile matter for the purpose of producing the coke. In the beehive process the volatile matter so extracted is dissipated in the atmosphere and lost, while in the by-product process the gas liberated is saved and used for fuel and illumination and, with some resultant chemical changes and by distillation and condensation, volatile matter is recovered in the form of pitch or tar, ammonia (used largely in the manufacture of fertilizers), cyanide and benzol and other oils used to generate power by internal combustion and for other purposes.

16. Much of the tar or pitch so recovered is used, among other purposes, in materials for the surface of highways, the State Highway Department of Pennsylvania using annually from 3,000,000 to 6,000,000 gallons of such tar or pitch for such purpose.

17. From said tar or pitch there are extracted by various processes certain products which, though it is possible to extract them from anthracite, cannot be produced therefrom in quantities rendering such production commercially practicable and none of which are in practice produced therefrom. Said products include:

Saccharine, a substitute for sugar;
 Lampblack;
 Dyes;
 Sulphur compounds;
 Indigo;
 Carbolic acid and other antiseptics and germicides;
 Explosives, including picric acid, 'T. N. T.' etc.;
 Flavoring materials;
 Hydroquinine, for photographic development;
 Paints;
 Cleansing compounds and paint removers;
 Chloride;
 Creosote;
 Perfumery;

And hundreds of medicinal and other products in common use.

18. Coke cannot be made from anthracite coal.

19. For the year 1917, the latest figures available, approximately 35 per cent of the coal used in the said by-product process in the United States, and more than half of that used in the beehive process was produced in Pennsylvania. In the year 1918 the quantities produced and the prices of the quantities sold of certain of the by-products obtained in the said by-product process operations in the United States were as follows: tar, 263,299,470 gallons, \$6,364,792; ammonia, 501,618,293 pounds, \$26,442,951; gas, 385,035,-

154,000 cubic feet, \$13,699,515; benzol products, 145,405,811 gallons, \$25,688,446; naphthalene, 16,087,498 pounds, \$650,229; other products, \$1,756,345; total \$74,602,458.

20. In 1918 the total production of coke in the United States was about 56,000,000 tons of a value of about \$382,000,000 at the ovens, and of said total production about 47 per cent was produced in Pennsylvania.

21. A large amount of bituminous coal produced in Pennsylvania is used in the production of gas for fuel and illumination in addition to the gas produced in connection with the manufacture of coke as aforesaid."

The Court also found, at the plaintiff's request (*Rec. p. 29*):

"23. The by-products obtained from bituminous coal are all obtainable from anthracite although not at present commercially produced therefrom."

With the additional fact "that such by-products cannot be produced from anthracite in quantities rendering such production commercially practical and none of which are produced therefrom."

The Court also found (*Rec., p. 29*):

"24. Coke made from bituminous coal is chemically similar to anthracite coal although structurally different, coke being cellular by reason of its not having been subjected to the squeezing process which nature has applied to anthracite coal."

Although the Court refused to find the plaintiff's 25th request, that "coke is used exclusively for fuel purposes," the refusal is coupled with the statement: "It appears in the answers that water-gas and producer-gas are made from coke" (*Rec., p. 29*).

In refusing to find the plaintiff's 26th request, that "the gas extracted from bituminous coal in the coking process is used for fuel," the refusal is coupled with the statement: "The gas liberated in the by-product process is saved and used for fuel and illumination, but the unliberated gas enters into other by-products not used for fuel."

In answer to plaintiff's 27th request, which reads:

"The different grades of anthracite coal vary materially in the amount of fixed carbon, and of volatile matter as well as in color, lustre and structural character, hardness, compactness, cleanness and freedom from dust, and such material variation exists between the different grades of anthracite coal and semi-anthracite and semi-bituminous."

the Court found:

"We find that the different grades vary in the particulars stated but there is nothing in the pleadings which justified a finding that they vary materially or that such material variation exists between the different grades of anthracite and semi-anthracite and semi-bituminous" (*Rec.*, p. 29).

In answering the plaintiff's 28th request, which reads:

"The fuel ratio of anthracite coal varies materially as between the different grades, and the fuel ratio of the different grades of anthracite coal differs materially from that of semi-anthracite and semi-bituminous coal."

the Court found:

"We find that the fuel ratio of anthracite coal varies, but we cannot find that such fuel ratio varies materially or that such ratio dif-

fers materially from that of semi-anthracite and semi-bituminous" (Rec., pp. 29, 30).

Assignment of Error.

Although various errors were assigned, the only one that will be ^{considered} pressed is, that the act is unconstitutional in that it denied the Thomas Colliery Company the equal protection of the laws. *The question arising under the company's claim being presented by the act being passed by the various States.*

POINTS.

I.

The producers of anthracite coal in Pennsylvania are denied the equal protection of the laws because the ad valorem tax imposed by the Act of May 11, 1921, is not made applicable to bituminous or other kinds or grades of coal produced in the State.

The primary use of coal, irrespective of grade or character, is for fuel. As fuel it produces heat for domestic purposes and steam for the development of power and kindred objects. All of the anthracite coal produced in Pennsylvania is sold in the general fuel market in competition with bituminous coal. Thirty per cent. of it, prepared in steam sizes, is sold in direct competition with bituminous and semi-bituminous and semi-anthracite grades of coal, and ten per cent. additional, consisting of pea coal, also competes directly with bituminous coal. Sixty-one per cent. of the anthracite coal produced in Pennsylvania is sold for

domestic purposes. The total production of anthracite coal in Pennsylvania in 1920 aggregated 78,842,000 tons; the semi-anthracite coal produced there amounted to 479,953 gross tons; and its bituminous and semi-bituminous coal output reached a gross tonnage of 145,000,000 gross tons.

Anthracite and bituminous coal are both mineralized deposits of vegetable matter, carbon being the principal component of both and the former containing a smaller proportion of volatile matter than the latter. Bituminous coal is soft, the softening developing only in the course of combustion and being a valuable quality. Anthracite coal is hard. Anthracite coal is practically smokeless, whilst bituminous coal burns with more or less smoke. Bituminous coal differs slightly in color and appearance from anthracite—one is dull and the other bright; one is clean and the other dusty. Both, however, are generically the same. Both are used for the same purposes. Upon both the public principally relies for heat and power. Both are mined and both may be used interchangeably for the accomplishment of their primary purposes, and both are coal.

It is, however, argued, that while anthracite coal is principally used for fuel, bituminous coal and its products are used for many other purposes. A considerable proportion of it is converted into coke by the elimination of its volatile matter by means of different processes. In 1918 about a quarter of the bituminous coal produced in Pennsylvania, approximately 38,000,000 out of 145,000,000 tons, was used in the manufacture of coke. Of the coal so used, approximately seventy-two per cent., or about 27,000,000 tons, was converted into coke by the beehive oven process, whereby the volatile matter extracted was dissi-

pated in the atmosphere and lost. About twenty-eight per cent., or approximately 11,000,000 tons, being only 7% of the total tonnage of bituminous coal, was made into coke according to the by-product process, whereby the gas liberated is saved and used for fuel and illumination, and with some resultant chemical changes and by distillation and condensation volatile matter is recovered in various forms.

But the coke resulting from both processes is used solely for the production of heat and power, just as the anthracite coal is used, and just as the bituminous coal can be used before the extraction of its gases and volatile matter in producing coke. In other words, the use of coke is only a method of employing the carbon contained in the coal for heat and power purposes. Except that its structure is cellular instead of compact it is identical with anthracite.

It is also contended that other substances are derived from the by-product coking process, by which, as stated, 11,000,000 or 7% of the 145,000,000 tons of bituminous coal produced in Pennsylvania, are treated. These by-products consist of tar, ammonia, cyanide, benzol, saccharine, dyes, paints, explosives, and other commercial substances, from the sale of which considerable sums are realized.

From these facts the defendants in effect argue, that although anthracite coal is used only for the production of heat and power for domestic, industrial and other purposes, and bituminous coal is principally used for the production of heat and power for the same purposes, but in addition is capable of producing other substances, (likewise contained in anthracite coal but not as yet derived commercially) from which a substantial

revenue is realized, an *ad valorem* tax may nevertheless be levied exclusively on anthracite coal. This amounts to the contention that, for the purposes of taxation, a classification is permissible whereby a tax may be imposed upon that grade of coal whose uses are limited, to the exclusion of another grade of larger volume which is used for identically the same purposes but may also in part be used for other purposes additionally profitable. Concisely stated, B equals A plus, yet A alone is taxed.

In this connection let it be borne in mind that of the 145,000,000 gross tons of bituminous coal produced in Pennsylvania, 107,000,000 tons, or 29,000,000 tons more than the total product of anthracite coal, are used for fuel, in the same manner as anthracite coal, without the application of any coking process, and, consequently, without the extraction of coke or of any of the by-products referred to.

For all practical purposes, therefore, we may eliminate from consideration all of the bituminous coal which is subjected to the coking processes, and Pennsylvania would still produce a much larger tonnage of bituminous coal than of anthracite coal, devoted to the identical purposes, and those only, for which anthracite coal is used. And yet, in levying this *ad valorem* tax, which Governor Sproul in his address to the Legislature asked to have laid on bituminous and anthracite coal alike, the entire burden has been imposed on anthracite coal alone. An explanation of this extraordinary result may possibly lie in the fact that there are only nine counties in Pennsylvania, in which anthracite coal is found and twenty-four counties in which bituminous coal is mined, and that the legislative representatives

from these bituminous counties have been quite ready to cast the burden of taxation upon those engaged in mining anthracite in the nine minority counties.

Attention has been directed to the decision in *Commonwealth v. Alden Coal Co.*, 251 Pa. St. 124, which declared unconstitutional the act of 1913, similar in substance and purpose to the statute now under consideration. It is true that in that case the constitutionality of the act was challenged under Section 1, Article IX, of the State Constitution, which directed that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. The contention that the act created an artificial and arbitrary distinction and discrimination between anthracite and bituminous coal, subjecting the former to taxation and not the latter, which is the same we now make, was upheld.

In the case at bar the Court of Common Pleas, when it came to consider the applicability of the equal protection clause said (*Rec.* p. 65):

“If it be intended to argue that there is a denial of the equal protection of the laws, that argument is already answered by what we have heretofore said.”

The reference there is to the discussion of the clause of the State Constitution considered in *Commonwealth v. Alden Coal Co.*, *supra*.

The Supreme Court of Pennsylvania in the opinion pronounced on the rendition of the judgment now under review, referring to the contention of the plaintiff in error that the statute of 1921 was a denial of the equal protection of the laws, *Rec.*, p. 141, apparently proceeded on the same theory, and cited *District of Columbia v.*

Brooke, 214 U. S. 138, 150, as affording a complete answer to the contention.

The practical identity of the provision of the Pennsylvania Constitution, as interpreted by the courts of that State, with the equal protection clause, as interpreted by this Court, as well as convenience for purposes of reference, warrant an extensive quotation from the opinion delivered by Mr. Justice Stewart in *Commonwealth v. Alden Coal Co.*, *supra*:

"In determining whether legislative classification is special and discriminatory, regard must be had to the purpose for which the legislation is designed. Differences, which make classification for some purposes proper, may furnish no reasonable basis for classification for other purposes; it is their relation to the end proposed by the particular legislation that determines whether classification is warranted. That differences, real and substantial, exist between anthracite and bituminous coal such as amply justify their separate classification for certain purposes, is without question. While both are natural products and the chief use of each is the same—the development of heat by combustion—yet they are distinguishable in so many ways, not only in their efficiency, but in respect to conditions under which they are found, conditions under which they are mined, and the processes by which they are severally made marketable, that, if both were to be subjected in all respects to the same legislative requirements, it would result in embarrassing each by imposing upon both regulations and restrictions entirely proper and necessary in the case of one but wholly unnecessary and oppressively burdensome upon the other. That the constitutional restraints and limitations upon legislative power were never intended to work such unequal and inequitable

results is apparent, and so whenever it has occurred that conditions in respect to one variety of coal and not the other, called for specific legislative action with respect to it, the legislature has without question or hesitation, for the particular purpose before it, placed the variety calling for the legislation in a class by itself and legislated with respect to it to the exclusion of the other. Our several statutes regulating the operation of coal mines, the employment of labor therein, the standard weight of each variety of coal, and distinguishing between the two varieties in many ways, all show this; but it will be found upon examination that whatever distinction is made between the two it is based upon a substantial difference, that is, one so marked as to call for separate legislation; and, further, that in every case there is correspondence between the difference which is made the basis of the classification and the object and purpose of the statute. The case of *Durkin v. Kingston Coal Co.*, 171 Pa. 193, 33 Atl. 237, is a fair illustration. The fact that the statutes referred to have been upheld as constitutional can be of no significance in our present inquiry except as we find like conditions here: First, a classification resting upon a difference between the two varieties peculiarly requiring it to the end that injustice and inequality might be avoided; and, second, a correspondence between the difference which is made the basis of the classification and the design and purpose of the proposed or enacted legislation, for, except as there be correspondence, the distinction is capricious. The right of the legislature to classify subjects within its jurisdiction for the purpose of enacting laws is unquestioned; so, too, is its right to determine what things shall be subject to tax for public purposes; but in both instances the right can be exercised only in subordination to certain constitutional re-

strictions. The legislature may no longer by arbitrary discrimination subject certain property to taxation, and exempt other property of the same kind and class and similarly situated from an equal burden. It may discriminate between two of a class in this respect by method of classification, but it can do this only when a substantial difference exists operating to make the distinction just and reasonable, and the legislation based thereon agreeable to something more than legislative notion of expediency. It must rest on a difference which bears a natural, reasonable, and just relation to the act in regard to which the classification is proposed; or, as stated by Mr. Justice Brewer in *Gulf, Colo. & Santa Fe Ry. Co. v. Ellis*, 165 U. S. 150, and quoted approvingly by Sterrett, C. J., in *Juniata Limestone Co., Ltd. v. Fagley*, 187 Pa. 193, 197, 40 Atl. 977: 'It must appear not only that a classification has been made, but also that it is one based upon some reasonable grounds—some difference which bears a just and proper relation to the attempted classification—and not a mere arbitrary selection.'

"It is constantly to be borne in mind that the right of classification is allowed in order to avoid or correct inequalities, never to create them. It is quite true that the details of the legislation with respect to taxation for public purposes, and the exemptions proper to be made, rest primarily within the discretion of the legislature, and in classifying subjects for taxation it cannot be required to state the grounds of the classification; but it is no less true that the action of the legislature in any particular case is subject to judicial revision to the extent of seeing that the classification adopted rests upon real distinctions, not artificial or irrelevant ones, in the subjects classified, and has not been adopted for the purpose of evading any con-

stitutional prohibition. When upon judicial revision it clearly appears that the classification adopted rests upon no substantial difference in the subject, that, whatever the difference, it bears no correspondence to the end and object of the act, the right and duty of the court to assert and maintain the supremacy of the Constitution, even though it means the defeat of the legislation, is too apparent to invite argument.

"Now, upon what difference between these two varieties of coal can this discrimination, which has for its object the subjection of the anthracite variety to taxation to the exclusion of the bituminous, rest? That they belong to one general class, are closely and intimately related both in respect to origin and use, is not open to dispute. Differences there are as we have before indicated, and wherever, because of these, the same legislation governing both would be unjust or oppressive to either, classification has properly been resorted to; but neither singly nor in combination do these differences suggest a reason why one should be taxed and not the other, whether regard be had to diversity in inherent or incidental qualities, diversity in commercial uses, in method of production, or even incompatibility or inconvenience in adopting the same method of taxation for both. A single difference as a basis of classification is suggested in the brief of argument on behalf of the appellee: 'The court, of its own knowledge, knows that the price of anthracite coal ranges from \$4 to \$8 per ton, and the price of bituminous coal ranges from \$1 to \$2 per ton. The reason is that anthracite coal is found almost exclusively in the state of Pennsylvania. The United States government has engaged in litigation to separate the coal carrying roads from the great coal corporations, notably the Reading Coal & Iron Company, upon the theory that there is an illegal com-

bination or trust. Proof of these facts is not necessary. The court only needs to find from human experience, some possible reason which induced the legislature to make the classification.'

"There may be something herein implied that would indicate a difference beyond that of market price in the two varieties, but certainly nothing beyond it is expressed. It may be that what is implied would be a proper consideration in determining a line of public policy, but we are not here dealing with questions of public policy, but with a single question of constitutional restriction upon legislative power to tax for public revenue. The one reason expressed is so wholly inadequate as a basis of differentiation that we need take no time in discussing it. It involves the proposition that it is competent for the legislature, by process of classification on the basis of market value, to throw the entire burden of the tax upon a selected few of an entire class, undistinguishable in its members in any other regard. And yet on this very crux of the case we have but this one suggestion of difference as a basis for classification, namely, market price or value. Were such rule to be recognized, the legislature would be invested with a discretion as wide and unrestrained as it originally exercised, but which the people by their Constitution declared should be confined within certain fixed limitations, one of which was that taxation should be uniform upon subjects of the same class. To allow the legislature arbitrarily to determine the class would be to defeat the very object of the constitutional restriction, and make taxation an instrument not of revenue but of monopoly."

"And so we recur to the main and only inquiry: What difference is there between anthracite and bituminous coal that makes the one, when prepared for market, a proper subject for taxation, and not the other? Our

answer must be, after the most careful consideration of the question, in the light of the findings of the learned judge who heard the case in the court below, and the arguments advanced on the part of the commonwealth, that we discover none. Not only so, but as the result of our inquiry we find that the classification adopted, instead of tending to promote equality in taxation, must necessarily have a contrary effect, to the manifest prejudice of the interest subjected to the tax. Take but one illustration: It is a fact found by the learned judge of the court below, not excepted to, that of the total annual tonnage of anthracite coal, amounting to upwards of 91,000,000 tons, 40 per cent. is sold in keen competition with bituminous coal in the fuel market. Here then we have two commodities in active competition, to the extent of nearly the one-half of the total production of one of them, in the open market; one taxed $2\frac{1}{2}\%$ per cent., *ad valorem*, on every ton produced, and the other untaxed. What effect this discrimination would have on the anthracite industry we do not know. It may be that the tax imposed is so moderate in amount that it would not cripple it in competition with the bituminous industry; but that is a matter aside from the present inquiry, it is the principle that concerns us. The unrestrained power to tax is the power to destroy, and if the legislature may impose a tax of $2\frac{1}{2}\%$ per cent., *ad valorem*, upon either commodity as distinguished from the other, we know of no constitutional restraint that would prevent it from increasing the tax to any limit it might see fit, even to the total destruction of the industry taxed."

We are not unmindful of what this Court, through Mr. Justice Bradley, said in *Bell's Gap Railroad Company v. Pennsylvania*, 134 U. S. 232,

that the equal protection of the laws guaranteed by the Fourteenth Amendment was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways; that regulations which proceed within reasonable limits and general usage are within the discretion of the State legislature, and that it was not intended to compel a State to adopt an iron rule of equal taxation. It was, however, added, that clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, might be obnoxious to the constitutional prohibition. The Court wisely refrained from attempting to lay down any general rule or definition that would include all cases, declaring that they must be decided as they arise. The general purpose and scope of the equal protection clause, as stated in *Barbier v. Connolly*, 113 U. S. 27, 31, were reiterated.

The numerous decisions in which legislation involving classification has been upheld by this Court are likewise appreciated. Our contention, however, is that such a classification as has been attempted in the case at bar is not based on any reasonable grounds which bear a just and proper relation to the attempted classification, but that what has been done amounts to arbitrary selection. The producer of anthracite coal used for heating and power purposes in competition with bituminous coal is arbitrarily selected for taxation upon his product, while the producer of bituminous coal, used for like purposes, is as arbitrarily absolved from such taxation. It is to be observed that the taxation is not assessed on the basis of so much per ton regardless of the value of the commodity, but on the value of the coal when prepared for market. If, therefore, the market value of anthracite coal when pre-

pared for shipment is \$10 per ton, the amount of the tax would be fifteen cents per ton, and if the market value of bituminous coal is only \$5 per ton the amount of the tax would be only seven and one-half cents per ton. Both taxes would be on an *ad valorem* basis and the producers would not, as competitors, be placed at a disadvantage or burdened by a tax unequally applied.

We contend that this case is governed by the principle announced and applied in:

Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, 165 U. S. 150.

Cotting v. Kansas City Stock Yards Co., 183 U. S. 79.

Connolly v. Union Sewer Pipe Co., 184 U. S. 500, 552-565.

Raymond vs. Chicago Union Traction Co., 207 U. S. 42.

Southern Ry. Co. v. Greene, 216 U. S. 400, 417.

Smith v. Texas, 233 U. S. 630.

Atchison, Topeka & Santa Fe Ry. Co. v. Vosberg, 238 U. S. 56.

Truax v. Raich, 239 U. S. 33.

Gast Realty Co. v. Schneider Granite Co., 240 U. S. 55.

Royster Guano Co. v. Virginia, 253 U. S. 412.

Kansas City So. Ry. Co. v. Road Improvement District No. 6, 256 U. S. 658.

Truax v. Corrigan, 257 U. S. 312, 335-339.

People ex rel. Farrington v. Menschina, 187 N. Y. 8.

Hauser v. North British & Mercantile Ins. Co., 206 N. Y. 455.

State v. Julow, 129 Mo. 163, 29 L. R. A. 257.

Bogni v. Perotti, 224 Mass. 152.

Park v. Detroit Free Press Co., 72 Mich. 560.

In *Southern Railway Co. v. Greene*, *supra*, a statute which imposed a new and additional franchise tax upon a foreign corporation admitted to do business in Alabama, for the privilege of doing business, which was not imposed upon domestic corporations, was held to violate the equal protection clause. Mr. Justice Day said:

"It is argued that the imposition of special taxes upon foreign corporations for the privilege of doing business within the State is sufficient to justify such different taxation, because the tax imposed is different, in that the one imposed on the domestic corporation is for the privilege of being a corporation, whereas the one on the foreign corporation is for the privilege of such corporation to do business within the State. *While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is proposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification.*

It is averred in the complaint, and must be taken as admitted, that there are corporations of a domestic character in Alabama carrying on the railroad business in precisely the same way as the plaintiff. It would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the privilege of a foreign corporation to do business in the State and the other for the right to be a corporation. The fact is that both corporations do the same business in character and kind, and

under the statute in question a foreign corporation may be taxed many thousands of dollars for the privilege of doing, within the State, exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars."

In *Royster Guano Co. v. Virginia*, *supra*, a State law taxed all the income of local corporations derived from business done outside of the State as well as business done within it, but exempted entirely income derived from outside the State by local corporations which did no local business. This statute was regarded as a violation of the equal protection clause. The opinion of Mr. Justice Pitney, after conceding the right to resort to classification for purposes of legislation and declaring that the classification must be reasonable, not arbitrary and must rest upon some grounds of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike, and pointing out that there is a wide latitude of discretion in the classification of property for purposes of taxation and the granting of partial or total exemptions upon grounds of policy, continues:

"Nevertheless, a discriminatory tax law cannot be sustained against the complaint of a party aggrieved if the classification appear to be altogether illusory. Now both of the taxing provisions here in question relate to corporations organized under the laws of Virginia. It is the object of Chapter 495 to exempt such corporations from income taxes (as well as taxes upon intangible property) where they do no business within the State except holding their stockholders' meetings therein; manifestly in recognition of the fact

that Virginia corporations so circumstanced derive no governmental protection from the State warranting the imposition of taxes upon their incomes derived from without the State or property taxes upon their intangibles, and in recognition of the impolicy if not injustice of imposing such taxes upon them while they are liable, and presumably subjected, to taxation in the State or States where their income-producing business is conducted. But no ground is suggested, nor can we conceive of any, sustaining this exemption which does not apply with equal or greater force as a ground for exempting from taxation the income of Virginia corporations derived from sources without the State where they also transact income-producing business within the State. Corporations of this class derive no more protection from the State of their origin with respect to their outside business, and are no less subject to taxation by the States in which such business is conducted, than corporations of the other class; and they are required to comply with the same laws as to the payment of organization taxes and annual registration fees and franchise taxes to the State of origin. Their business done within the State presumably is of some benefit to the State, certainly enriches its treasury by the amount of the taxes they pay upon the income derived therefrom; and the imposition upon them under Chapter 472 of taxes not only upon this income but also upon income that they derive from business conducted outside of the State (similar income of the favored corporations being exempted) has the effect of discriminating against them for that which ought to operate if at all in their favor. It is obvious that the ground of difference upon which the discrimination is rested has no fair or substantial relation to the proper object sought to be accomplished by the legislation. It follows that it is arbitrary in effect; and none the less because it is probable

that the unequal operation of the taxing system was due to inadvertence rather than design."

We may here suggest parenthetically that in the case at bar we find that although the Governor recommended a tax whose incidence should effect equally bituminous and anthracite coal, the Legislature in which only nine counties represented anthracite and twenty-four bituminous coal disregarded this just proposal. This fact, coupled with the fact that two previous legislatures had ineffectually attempted to impose the burden of taxation solely on anthracite coal minimizes the probability that the inequality of this tax "was due to inadvertence rather than to design."

In *People ex rel. Farrington v. Mensching, supra*, a provision of the Stock Transfer Tax Act of New York, which imposed a tax of two cents on each share of \$100 of face value or fraction thereof, was held to constitute an arbitrary discrimination between the owners of corporate shares of the face value of \$100 and those owning corporate shares of a lesser face value. In the course of his opinion Judge Vann, fully recognizing the latitude afforded to legislatures in classification, pointed out that there must be some basis in reason for the power as exercised, and remarked:

"While the State can tax some occupations and omit others, can it tax only such members of a calling as have blue eyes or black hair? We have said that it could tax horses and leave sheep untaxed, but it does not follow that it could tax white horses and omit all others, or tax the sale of certificates printed on white paper and not those on yellow or brown. While one class may be made of horses and another of sheep, or even a class

made of race horses, owing to the use made of them, without a shock to common sense, a classification limited to white horses would be so arbitrarily as to amount to tyranny, because there would be no semblance of reason for it. A reason might be advanced, though specious and unsound, for taxing Holstein bulls and no others, but could even a sophist argue in favor of taxing Holstein steers and no others, since they are incapable of reproduction! * * * Perhaps an answer to these questions may be found in *Cotting v. Kansas City Stock Yard Co.* (183 U. S. 79), where a general act, the effect of which was to classify stock yards in the State of Kansas as to discriminate against the largest stockyard in the State, but without mentioning it by name, was held to be unconstitutional because it denied to that company the equal protection of the laws. A similar fate met an act of another State, which provided that a certain tax should be imposed only upon those taxable inhabitants of a school district who had not paid a tax assessment in the year 1871. (*State ex rel. Trustees v. Township, etc.*, 36 N. J. Law, 66.)"

We might in this connection suggest that, while wool might be classified for purposes of taxation, it is scarcely conceivable that coarse wool might be taxed and fine wool excluded from taxation; or that California oranges sold in the markets of Pennsylvania might be taxed and Florida oranges exempted from taxation; or that hard wheat alone should be taxed and other qualities of wheat relieved from taxation.

In *Hauser v. North British & Mercantile Ins. Co.*, *supra*, a section of the New York Insurance Law confining the business of a broker in procuring insurance to those making it their principal

business or who should be real estate agents or brokers, was held to violate the equal protection clause as applied to a lawyer who was also seeking to carry on the business of insurance. Judge Gray said:

"But the legislature has prescribed in this statute a condition for the issuance of the license, which is a purely arbitrary restriction. There is no good reason, and no public interest can, conceivably, be subserved, in prohibiting persons from conducting the business of an insurance agent, or broker, in connection with any other lawful business, or occupation, in which they may be engaged. As it was intimated below, following the suggestion in *People v. Ringe* (197 N. Y. 143), the legislation now in question must have been promoted in the interests of those engaged in the insurance brokerage business, alone, or in connection with a real estate brokerage business, rather than with any view of the public welfare."

In *State v. Julow*, supra, Mr. Justice Sherwood said, of a statute which restricted the right to discharge laborers because of membership in the labor unions:

"The legislature may legislate in regard to a class of persons, but they cannot take what may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dis severed fractions of the original unit as two classes, and enact different rules for the government of each. This would be a mere arbitrary classification without any basis of reason on which to rest, and would resemble a classification of men by the color of their hair or other individual peculiarities, something not competent for the legislature to do."

Not only is bituminous coal excluded from the tax levied under this act, but semi-anthracite and semi-bituminous coal are likewise freed from this taxation. The trial court found (*Rec.*, p. 37), that the coal known as semi-bituminous is a grade of bituminous coal higher in its percentage of fixed carbon and lower in its percentage of volatile matter than is ordinarily the case in bituminous coal; that the coal known as semi-anthracite is a low grade of anthracite coal containing some volatile matter and a lower percentage of fixed carbon than is ordinarily the case with anthracite coal. It was also found that the total quantity of anthracite coal produced in Pennsylvania was many times larger than the quantity of semi-anthracite coal produced there, and that the quantity of semi-bituminous coal is very small compared with the total quantity of bituminous coal produced in Pennsylvania. Nevertheless the quantities are substantial, it being alleged in the complaint and admitted in the answer (*Rec.*, pp. 9, 21) that the production of semi-anthracite coal in Pennsylvania, in 1920, was 479,953 gross tons. The quantity of semi-bituminous coal is not given, but is included in the total of 145,000,000 gross tons of bituminous and semi-bituminous coal produced in Pennsylvania.

It is, however, admitted (*Rec.*, pp. 9, 21) that the anthracite coal, and especially that sold in steam sizes, that is, coal used for the production of steam, is sold in direct competition with bituminous, semi-bituminous and semi-anthracite grades of coal in the fuel markets both in Pennsylvania and outside of Pennsylvania.

II.

The opinion of the Pennsylvania Supreme Court.

(1) The Court objected to the contention of plaintiff's counsel that "coal is coal," and retorted that "land is land," "ice is ice" and "gas is gas," but that, nevertheless, the legislature may tax differently seated and unseated land, natural ice and artificial ice, and natural gas and manufactured gas.

There is no parallel between the two contentions. Anthracite and bituminous coal are both a natural product, are both used primarily for fuel purposes. They are both mined, and, when prepared for shipment, are, for all practical purposes, identical. The same cannot be said of seated and unseated land. They are fundamentally different. In like manner, there is an inherent difference between natural and artificial ice, natural and manufactured gas. The natural ice and the natural gas are both products of nature. The artificial ice and the manufactured gas are both created by human agencies and under special conditions. In like manner, charcoal is a manufactured product which does not partake of the qualities of mined coal, and cannot to any extent be used as a substitute, in producing either heat or power, for anthracite or bituminous coal, which, on the contrary, can be substituted, the one for the other, for that purpose.

The suggestion that "the thing, not the name, is the important matter," is entirely true. The word "bituminous" is technically inaccurate, for the grade of coal bearing that name does not con-

tain a particle of bitumen. It is, nevertheless, accurately described by the generic term "coal," just as anthracite is "coal," and nothing else.

(2) The suggestion that coal, graphite and diamonds are all different forms of carbon and that they need not be taxed alike, is entirely beside the question.

The chemical constituents of anthracite and bituminous coal are such that, so far as the use of both grades of coal for the production of heat and power is concerned, they operate substantially alike, assume practically the same form, and produce the same results.

The admission that coke is anthracite coal in its essential respects, which is entirely true, merely emphasizes the contention that there is, for all practical purposes, identity between anthracite and bituminous coal. Not only can they be used interchangeably, as already indicated, but so much of the bituminous coal as is converted into coke by the application of heat becomes the natural equivalent of anthracite.

(3) The statement in the opinion (*Rec. p. 136*), that the plaintiff has conceded that bituminous coal may be divided into two classes for purposes of taxation, one, that part of it that is manufactured into coke, and the other, the part that is not so manufactured, does not correctly state our position as applied to the statute now under consideration, which undertakes to impose a tax on coal that has been mined and is ready for shipment or market.

Had bituminous coal been taxed on the same basis as anthracite coal, as proposed by Governor Sproul, the assessment of the tax would occur before any coking takes place—it would be on a

valuation of the coal in its natural state, before being subjected to any manufacturing process, when every ounce of it might be used in its then condition for precisely the same purposes as every ounce of anthracite coal could be used. The fact that some or all of the bituminous coal might be devoted to secondary uses, is irrelevant in considering the tax imposed on the producer of the coal when assessed immediately after it has been mined and before shipment. Either anthracite or bituminous coal might be subsequently used for ballasting ships, or for any other purpose for which it might be adapted.

As a practical proposition, for purposes of taxation anthracite and bituminous coal alike must be considered in the form in which they exist after mining and before shipment. We do contend, however, that, so long as the quantity of bituminous coal annually produced in Pennsylvania equals or exceeds the quantity of anthracite coal produced in that State, the fact that there is an additional quantity of bituminous coal that is converted into coke and resultant by-products is not of the slightest consequence. We are not concerned with coke or gas, saccharine, dyes, explosives or perfumery, that may be derived through manufacturing processes from 11,000,000 tons, which is the equivalent of seven per cent. of the 145,000,000 tons, of the bituminous coal produced in Pennsylvania, even though the most valuable substance recovered from the coal subjected to by-product processes consists of coke, which is, in all essential respects, anthracite coal.

(4) Although the fact that bituminous and anthracite coal are competitive, is of considerable moment in arriving at a classification for the purposes of taxation, we are not basing our argu-

ment solely on that consideration. It is, therefore, no answer to say that, because the element of competition may exist in various articles used for clothing, including silk, velvet, cotton goods, gingham, all these articles would have to be put into one class, disregarding their essential and obvious differences of character, structure and use. The same comments apply to the illustrations contained in the opinion (Rec., p. 138), of bricks and stones used for buildings, slate and shingles used for roofing, mahogany and pine used for furniture, plated ware and solid silver used on the table. In every one of these instances the differences between the contrasted articles are so palpable, that they overcome any argument to be deduced from similarity of purpose.

In the case at bar there is not only absolutely identity of use, but practical identity in the origin, structure, method of production and physical characteristics of anthracite and bituminous coal. For the purposes of laying an *ad valorem* tax before shipment, the attempted distinction between the two grades of coal is purely illusory.

(5) The contention that the Congress of the United States and the Canadian Parliament have taxed anthracite and bituminous coal differently, has no bearing upon the tax now under discussion.

The various acts referred to in the answer (Rec., pp. 20, 21) all related to the levying of import taxes, and are based on the principle of the protective tariff. In view of the fact that on this continent practically all anthracite coal is produced in Pennsylvania and only a limited quantity has been mined abroad, there has been practically no occasion for imposing an import duty on anthracite coal; whereas, during the years

when a tax was laid on the importation of bituminous coal, in view of the extensive production of that grade of coal abroad, there was a greater probability that it might be imported in large quantities, and thus interfere with the sale of the American product. It was, however, found that neither the producers of bituminous nor of anthracite coal required protection, and, since 1913, all coal has been on the free list. In the Tariff Act of 1922, paragraph 1548, under Title Two, relating to the Free List, we find the following:

“Coal. Anthracite, bituminous, culm, slack and shale; coke; compositions used for fuel in which coal or coal dust is the component material of chief value, whether in briquets or other form.”

(6) The fact that the railroads of Pennsylvania, in their commodities classification, divide coal into two classes, bituminous and anthracite, and sub-classify anthracite into at least three sizes (a) domestic size, larger than pea coal; (b) pea coal, and (c) smaller than pea coal, all carrying different freight rates, has no bearing on the *ad valorem* tax with which we are now dealing. The rating is based on the relative market values of the various grades of coal. In an *ad valorem* tax that difference is naturally absorbed, and, therefore, does not warrant such a classification as that created by the statute under consideration.

(7) The acts of Pennsylvania fixing the standard weights of bituminous coal at 76 pounds to the bushel and 2,000 pounds to the ton, and of anthracite coal at 2,240 pounds to the ton (*Rec. p. 42*), merely reflects trade customs long prevailing in the respective districts in which coal is pro-

duced. Anthracite coal, as has been seen, is mined in only nine counties of the Commonwealth and in a compact district east and north of the Susquehanna River, while bituminous coal is mined in twenty-four counties, covering a large part of the area west and south of the Susquehanna River.

(8) "That the price of anthracite on cars at the mine is ordinarily much larger than the price of bituminous coal on cars at the mine" (*Rec.*, p. 21), is of no consequence when one considers the fact that we are dealing with an *ad valorem* tax. If anthracite bears a higher price than bituminous at the mine, the bituminous coal would be only taxed in accordance with its value, just as the anthracite would be taxed on its value. The explanation of the difference in price set forth in the answer (*Rec.*, p. 21), is that it results largely from "differences in rates of royalty and cost of production and preparation for market." That presents a very potent reason why anthracite coal, which is sold in competition with bituminous coal, should not be subjected to another and additional burden in the form of a tax from which the bituminous coal is exempted.

(9) The circumstance that Pennsylvania has two distinct acts regulating the mining of coal, one of which applies to anthracite and the other to bituminous coal, is entirely beside the question with which we are now confronted. Those acts relate to mining methods, which depend upon the physical differences occasioned by the form and character of the mineral deposits, and other physical conditions relating to and affecting the extraction of the coal. They have no bearing, however, on the levying of an *ad valorem* tax assessed upon the coal after it has been mined and is ready for shipment.

(10) Anthracite coal is not only subjected to this *ad valorem* tax from which bituminous coal is exempted, but, while in place in the mine, it is assessed at its full value as land. County taxes, township taxes, city taxes, school taxes, road taxes, borough taxes and poor taxes are levied upon it. Mining corporations engaged in its extraction are required to pay taxes to the Commonwealth upon their capital stock, and in the ascertainment of the basis of such taxation the value of the coal lands belonging to the corporations is considered (*Rec. p. 10*).— The producers of anthracite coal are, therefore, bearing more than their just share of taxation when compared with the producers of bituminous coal.

(11) It should also be borne in mind, as affecting the ability of the producers of anthracite coal to market their product in competition with the miners of bituminous coal, that approximately eighty per centum of the total production of anthracite coal is shipped, sold and used as fuel outside of the Commonwealth of Pennsylvania. Consequently, if in addition to the increased cost of production of the anthracite coal to which reference has already been made, due to the obligation to pay larger royalties and to the cost of mining and preparation for market, as well as the increased freight charges which the anthracite coal bears because of this increased price, there is to be added one and one-half per cent. as an *ad valorem* tax on the value of the coal at the mine, the producers of anthracite are further handicapped in their efforts to sell to the consumer of coal in competition with the producers of bituminous coal.

(12) In the opinion (*Rec. p. 136*), and in the brief of the Attorney General in the court below,

great stress is laid on *Commonwealth v. Delaware Division Canal Co.*, 123 Pa. 592, 621, where it is said:

"Nor is classification necessarily based upon any essential differences in the nature, or, indeed, the condition of the various subjects; it may be based as well upon the want of adaptability to the same methods of taxation, or upon the impracticability of applying to the various subjects the same methods, so as to produce just and reasonably uniform results, or it may be based upon well-grounded considerations of public policy."

Whatever may be said concerning other methods of taxation than that here involved, every fact disclosed indicates that the *ad valorem* method of taxation applied to anthracite coal is equally adaptable to bituminous coal, that it is just as practicable to apply that method of taxation to the one as to the other of these grades of coal, and that, if applied to both, just and reasonably uniform results would be produced.

In spite of all the efforts to differentiate between anthracite and bituminous coal, nothing has been shown to warrant the statement that one should be taxed and the other exempted from taxation upon any considerations of public policy. The fact that Governor Sproul asked for a tax on both shows that considerations of public policy are not at the basis of the classification that has been made. It may rather be sought in the circumstance that anthracite coal is produced in nine counties only, while bituminous coal is produced in twenty-four. That does not, however, present a consideration of public policy, but gives point

to the challenge that this legislation is a glaring instance of arbitrary selection.

(13) *District of Columbia v. Brooke*, 214 U. S. 138, from which there is a quotation (*Rec.*, p. 141), is not a parallel to the present. The right to classify which was there asserted, is too well settled to be questioned. The language which immediately follows that quoted in the opinion below indicates, however, the existence of a reason for the classification considered in the case cited which is absent in the case at bar. Mr. Justice McKenna makes this exceedingly clear:

"The act in controversy makes a distinction in its provision between resident and non-resident lot owners, but this is a proper basis for classification. Regarded abstractly as human beings, regarded abstractly as lot owners, no legal difference may be observed between residents and non-residents, but regarded in their relation to their respective lots under regulating laws, the limitations upon jurisdiction, and the power to reach one and not the other, important differences immediately appear. We said in *St. John v. New York*, 201 U. S., at pages 633, 637, not only the purpose of a law must be considered, but the means of its administration—the ways it may be defeated. Legislation, to be practical and efficient, must regard this special purpose as well as the ultimate purpose."

Here there is no possible ground for contending that the means of administering the statute which we now have before us, if applied to bituminous coal, would vary in the slightest particular from the methods applied to anthracite. Nor is there any question as to limitation upon jurisdiction as in the case of non-residents, or of the power to reach a non-resident. Here the producers of

bituminous coal are within the jurisdiction of Pennsylvania, and may be reached with the same ease as the producers of anthracite coal, and the relation of the former to their respective mines is exactly the same as that of the latter, and particularly so far as the subject of an *ad valorem* tax on production is concerned.

III.

It is respectfully submitted that the judgment of the Supreme Court of Pennsylvania should be reversed, with directions to grant the relief prayed for in the Bill of Complaint.

LOUIS MARSHALL,
Counsel for Plaintiff in Error.

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IN THE
Supreme Court of the United States,

OCTOBER TERM, 1922.

No. 541.

ROLAND C. HEISLER,
Plaintiff in Error,

vs.

THOMAS COLLIERY COMPANY, E.
HERBERT SUENDER, SUPERIN-
TENDENT; JOHN GILBERT *et al.*,
&c., *et al.*

**BRIEF ON BEHALF OF THE STATES OF NEW
YORK, NEW JERSEY, MASSACHUSETTS,
MAINE, NEW HAMPSHIRE, VERMONT,
RHODE ISLAND, CONNECTICUT AND
DELAWARE.**

The Statute of Pennsylvania involved in the appeal in the above case is an attempt by that State to levy tribute upon the citizens of the States of New York, New Jersey, Delaware, Massachusetts and the other New England States by taxing anthracite coal produced in Pennsylvania and as to eighty per cent. of the total production shipped

to states outside of the State of Pennsylvania. On behalf of the citizens of these states other than Pennsylvania, which constitute the major "market" for anthracite coal, this brief is filed.

It is an admitted fact that the entire present source of supply of anthracite coal is confined to the State of Pennsylvania and to nine counties only of that Commonwealth (see Record, p. 9). It is also an admitted fact and one to which we propose to refer more fully later that eighty per cent. of the anthracite coal produced in Pennsylvania is shipped out of Pennsylvania to other states and foreign countries. A very large proportion of the eighty per cent. so shipped out of Pennsylvania is shipped to and consumed in New York, New Jersey, Delaware and the New England States.

Many years of use and custom have rendered anthracite coal a prime necessity in these states, particularly for domestic purposes. Not only has long use and custom made anthracite coal indispensable to the citizens as a fuel, but in practically all the important cities and centers of population, municipal laws and ordinances have been passed forbidding the use of other coal for heating purposes.

The dependency of these states upon the State of Pennsylvania for anthracite coal is a matter of common knowledge and of judicial notice, particularly in view of the Acts of Congress recently

passed as a result of the prices arising from the prevailing suspension of anthracite coal mining and for the investigation of the industry.

In *United States v. Reading Company*, 226 U. S. 324 at page 338, the Bill of Complaint filed by the Government alleged, and it was assumed as a fact by the Court:

"That anthracite coal is an article of prime necessity as a fuel and finds its market mainly in the New England and Middle Atlantic States. The deposits of coal, with unimportant exceptions, lie in the State of Pennsylvania but do not occupy a continuous field though found in certain counties adjoining in the eastern half of the state and embrace an area of 484 square miles. This coal region is from 150 to 250 miles long."

It follows from the foregoing admitted facts that the Statute of Pennsylvania involved in this appeal necessarily imposes a direct and substantial burden upon the citizens of New York, New Jersey, Delaware and the New England States. It is true the percentage of *ad valorem* taxes provided for under this Statute is comparatively small, but if a tax of $1\frac{1}{2}\%$ is valid, there is no legal or constitutional reason why the legislature of Pennsylvania cannot increase the percentage whenever the producing State may need more revenue. The earlier Anthracite Tax Laws passed by the Legis-

lature of Pennsylvania in 1913 and in 1915 and which were declared unconstitutional by the Pennsylvania Courts, imposed a $2\frac{1}{2}\%$ *ad valorem* tax. The legal principle is the same whether the tax be large or small as the Supreme Court of Pennsylvania pointed out in its opinion holding the first tonnage tax of 1913 unconstitutional, the Court there using the following language:

"What effect this discrimination would have on the anthracite industry we do not know; it may be that the tax imposed is so moderate in amount that it would not cripple it in competition with the bituminous industry; but that is a matter aside from the present inquiry, it is the principle that concerns us. The unrestrained power to tax is the power to destroy, and if the legislature may impose a tax of two and a half per cent., *ad valorem*, upon either commodity as distinguished from the other, we know of no constitutional restraint that would prevent it from increasing the tax to any limit it might see fit, even to the total destruction of the industry taxed."

Commonwealth v. Alden Coal Co., 251 Pa. 134, at p. 143.

The Act of Assembly of the Commonwealth of Pennsylvania of May 11, 1921 (P. L. 479), is void because it attempts to regulate interstate commerce (Second Assignment of Error; Record, p. 157); and because it seeks to levy an export tax (Third Assignment of Error; Record, p. 157).

The Statute imposes an *ad valorem* tax on anthracite coal when "prepared for market", the tax to "be assessed at the time when said coal is ready for shipment", and is void as a regulation of interstate commerce and as an export duty because the "market" for such commodity taxed when "ready for shipment", is eighty per cent. in other states and countries.

The Statute levies the tax upon anthracite coal as an article of commerce and only upon said coal when it has become an article of commerce.

Section 1 of the Statute provides:

"Section 1. Be it enacted, &c., That from and after the passage of this act, each and every ton of anthracite coal, of the weight of two thousand two hundred and forty (2,240) pounds avoirdupois, mined, washed, screened, or otherwise prepared for market in this Commonwealth, shall be made subject to a tax of one and one-half per centum ($1\frac{1}{2}$) of the value thereof when prepared for market, which said tax shall be assessed at the time when said coal has been mined, washed or screened, and is ready for shipment or market."

And in Section 2 of the Act it is provided *inter alia* as follows:

"Section 2. It shall be the duty of the individual, or the superintendent or other officer, in charge of any mine or mines, or washery, or operation, to assess the tax hereby imposed, from time to time, as the coal is mined, washed, or screened, and is ready for shipment or market * * *."

Of what kind of commerce is the taxed commodity an article when the assessment is made? Where is the "market" for which it is "ready"? What kind of "shipment" is to be made when the tax attaches? Concededly, interstate commerce, an interstate and foreign "market", and an interstate "shipment" to consumers living in other states and countries as to 80 per centum of the commodity.

Like the grain collected in the elevators of North Dakota as to which a large but undetermined proportion thereof was intended for later shipment to other states, the anthracite coal of Pennsylvania after being mined, prepared and made "ready for shipment" is subjected to a burden of taxation by the producing state.

In *Lemke v. Farmers' Grain Co.*, No. 456, October Term, 1921, decided February 27, 1922, Advance Opinions, Supreme Court, No. 10, April

1, 1922, L. Ed. page 273, it was held by this Court:

"The business of buying grain in North Dakota, practically all of which is intended for shipment to, and sale at, terminal markets in other states, conformably to the usual and general course of business in the grain trade, is interstate commerce which a state may not regulate by a statute which has the effect of controlling and burdening such commerce."

Mr. Justice Day in delivering the opinion of the Court said (p. 274):

"We pass to a consideration of the merits. The record discloses that North Dakota is a great grain-growing state, producing annually large crops, particularly wheat, for transportation beyond its borders. Complainant, and other buyers of like character, are owners of elevators and purchasers of grain bought in North Dakota, *to be shipped to and sold at terminal markets* in other states, the principal markets being at Minneapolis and Duluth. *There is practically no market in North Dakota for the grain purchased by complainant.*

* * * * *

"The grain is placed in the elevator for shipment, and loaded at once upon cars for shipment to Minneapolis and elsewhere outside the state of North Dakota. * * * The market for grain bought at Embden is

outside the state of North Dakota, and it is an unusual thing to get an offer from a point within the state. * * *

"That such course of dealing constitutes interstate commerce, there can be no question. This court has so held in many cases, and we have had occasion to discuss and decide the nature of such commerce in a case closely analogous in its facts, and altogether so in principle. *Dahnke-Walker Mill Co. v. Bondurant*, decided December 12, 1921 (257 U. S. 282, *ante*, 114, 42 Sup. Ct. Rep. 106). * * *

"* * * It is true, as appellants contend, that after the wheat was delivered at complainant's elevator, or loaded on the cars for shipment, it might have been diverted to a local market or sent to a local mill. But such was not the course of business. The testimony shows that practically all the wheat purchased by the complainant was for shipment to and sale in the Minneapolis market. That was the course of business, and fixed and determined the interstate character of the transactions. *Swift & Co. v. United States*, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; *Eureka Pipe Line Co. v. Hallanan*, decided by this court December 12, 1921 (257 U. S. 265, *ante*, 127, 42 Sup. Ct. Rep. 101); and *United Fuel Gas Co. v. Hallanan*, decided the same day (257 U. S. 277, *ante*, 130, 42 Supt. Ct. Rep. 105)." (Italics ours.)

Later in the opinion the governing principle is thus set forth by a quotation from the case of *Minnesota Rate Cases*, 230 U. S. 352, as follows:

"The principle which determines this classification (between Federal and State power) underlies the doctrine that the states cannot, under any guise, impose direct burdens upon interstate commerce. For this is but to hold that the states are not permitted directly to regulate or restrain that which, from its nature, should be under the control of the one authority and be free from restriction, save as it is governed in the manner that the national legislature constitutionally ordains."

In the foregoing case it does not appear what the proportion of grain exported from the State of North Dakota was to that consumed within the state. In the case at bar it is an admitted fact that four-fifths or 80% of the anthracite coal production of Pennsylvania when "ready for shipment or market" goes outside of the state and that such exportation is and has been for many years the usual and continuous course of business in the production and marketing of anthracite coal.

The Bill of Complaint in this case alleges, and it is not disputed, that (Record, p. 10):

"15. Of all the said grades of coal found in Pennsylvania a very large proportion is

exported to other States and Territories of the United States and to foreign countries. Approximately 80 per centum of the total production of anthracite coal is shipped, sold and used as fuel outside of the Commonwealth of Pennsylvania."

Not only does four-fifths of the total burden of taxation provided for by the Statute in question here fall upon interstate commerce and upon the consumers of anthracite coal in states and countries other than Pennsylvania, but that very fact was the argument used by the Governor of Pennsylvania in urging the passage of the Statute, and by its proponent in the legislature in introducing it.

We quote the words of Governor Sproul of Pennsylvania in his message to the Pennsylvania Legislature as follows:

(Pennsylvania Legislative Journal, Session 1921, issue of January 18, 1921, at p. 34):

"Perhaps the most practicable plan, in that the slight burden it would impose would be very widely distributed and a large proportion of it would come from beneficiaries of Pennsylvania's natural resources living elsewhere, would be found in a small *ad valorem* tax upon coal."

* * * * *

"The tax upon coal, if administered as outlined above, would in itself, come near to

meeting our reasonable requirements. It should be accompanied by legislation which would prevent the addition of larger sums than were actually paid to the costs of coal to the consumer as a compensation for taxes. This will prevent any gouging of the public or any excuses regarding the 'costs of collection'."

Mr. Williams when introducing the measure into the Pennsylvania Legislature, said:

(Pennsylvania Legislative Journal,
Issue of April 20, 1921, p. 2488):

"Mr. Williams: Mr. Speaker, I desire to say that this is one of the revenue measures suggested by the Governor—a tax on anthracite coal. As it was originally introduced it called for a tax of two and one-half per centum, but it has been amended and reduced to one and one-half per centum per ton.

* * * * *

"On the basis of six dollars per ton, on the coal mined during 1920, the tax at one and one-half cents per ton would have amounted to \$8,067,000. Eighty per cent. of that would have been paid by people living outside of the State of Pennsylvania, which would have left \$1,600,000 of this tax to have been paid by people within the State.

"Twenty-eight per cent. of the anthracite coal mined in the state of Pennsylvania is shipped to New York and tidewater points; ten per cent. to New England points; ten

per cent. to points on the Great Lakes; ten per cent. to Canada; twenty per cent. is used in the State of Pennsylvania, with scattering amounts in other states. Now, gentlemen, this great natural resource of the State of Pennsylvania is fast being depleted, and if the State of Pennsylvania is ever to get any revenue from hard coal, it must begin now. The revenue from this source is needed to meet the increased cost to the State of the teachers salary bill."

If any authority is needed for the consideration of Governor Sproul's message by the United States Supreme Court, any of the following cases disclose that that court takes notice of all laws of states, and of all instruments, public documents, etc., which the *state court could take judicial notice of* even though the local courts did not in fact do so. Certainly the Pennsylvania courts could have taken judicial notice of the Governor's message which the constitution of that state (Art. IV, § 11) requires that he transmit from time to time to the General Assembly, and of the journals of the legislative bodies also required by the constitution to be kept (Art. II, § 12).

Mills v. Green, 159 U. S. 651, 657.

Hanley v. Donoghue, 116 U. S. 1, 6.

Daniels v. Tearney, 102 U. S. 415, 419.

Jones v. United States, 127 U. S. 202, 214.

New York Indians v. United States, 170
U. S. 1, 32.

Tompkins v. Little Rock R. R., 27 Fed.
370, 376.

It therefore clearly appears from the language of the Statute itself, from the admitted facts as to the "market" to which the coal is "ready for shipment" when taxed, and the statements of its advocates that the Statute is actually and frankly an attempt to tax anthracite coal as an article of interstate commerce and an export to other states. Even though the purpose and effect of the Statute as a tax upon the export of eighty per cent. of the anthracite production be disguised in the language used, and even though the State Courts have so construed the Act as not to be such an export tax, the Statute nevertheless would fall under the ban of the constitution if its real purpose and effect is to impose a burden upon interstate commerce.

Hump Hairpin Manufacturing Company v. Emmerson, No. 139, October Term, 1921, decided March 27, 1922, Advance Opinions Supreme Court, No. 12, May 1, 1922, L. Ed., page 343.

Crew Levick Company v. Pennsylvania,
245 U. S. 292.

In this latter case, this Court held:

"This court determines the constitutionality of a state tax upon its own judgment of the actual operation and effect of the tax irrespective of its form and of how it is characterized by the state courts."

The same principle was declared and applied in *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, where, in holding unconstitutional a statute which exacted from the telegraph company as the condition of doing local business in Kansas a fee of a given per cent. of its authorized capital, this court said, by Harlan, J., at page 30:

"Looking, then, at the natural and reasonable effect of the statute, disregarding mere forms of expression, it is clear that the making of the payment by the Telegraph Company, as a charter fee, of a given per cent of its *authorized capital*, representing, as that capital clearly does, *all* of its business and property, both within and *outside of the State*, a *condition* of its right to do local business in Kansas, is, in its essence, not simply a tax for the privilege of doing local business in the State, but a burden and tax on the company's interstate business and on its property located or used outside of the State."

This case is directly in point, as to the principle here involved. Kansas had an undoubted

right to exact an excise fee for doing local business, but when Kansas so exerted that power as to burden interstate commerce, the fact that the tax was exacted for the privilege of doing local business only and was not in terms a tax upon interstate commerce could not save it.

In this case the coal shipped to points within the State is not distinguished and cannot be distinguished from the coal shipped into other states. The tax is placed upon both without distinction. The burden upon interstate commerce is the same whether the tax be assessed at the moment before the coal starts upon its journey or the moment after. If the right to exact a fee for doing local business was insufficient to sustain the Kansas tax, the general right of Pennsylvania to tax property within its borders is insufficient to sustain the special and additional tax exacted under the circumstances here presented.

It may be urged that the tax here in question is exacted whether the coal is shipped to some other point in Pennsylvania or is shipped outside the State. That is of no consequence if the necessary operation of the tax is to burden interstate commerce. In the *Western Union Telegraph* case, *supra*, the court quoted with approval from *Brimmer v. Rebman*, 138 U. S. 78, on p. 82, as follows:

"Nor can this statute be brought into harmony with the Constitution by the cir-

cumstance that it purports to apply alike to the citizens of all the States, including Virginia; for, 'a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute.' *Minnesota v. Barber*, 136 U. S. 313, 319; *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 497."

We do not overlook the case of *Coe v. Errol*, 116 U. S. 517, 29 L. Ed. 715, where it was held that a tax upon personal property as a part of the general mass of property in the State in the usual and ordinary mode of taxation of such personal property within the State was not a tax upon interstate commerce, although it appeared that such personal property consisted of logs collected at a point within the state and undoubtedly intended later for shipment outside of the State. The tax imposed by the Statute in the case at bar is not a tax upon anthracite coal as a part of the general mass of property within the State of Pennsylvania assessed at the regular period of assessment for such property and in the usual manner, within the meaning of this Court in the case of *Coe v. Errol*, *supra*.

The regular and usual mode of assessing a tax upon anthracite coal in Pennsylvania is set forth

in the Bill of Complaint and admitted in the answer as follows (see Record, p. 10):

"14. Coal in place is assessed at its full value as land and all local taxes levied thereon, to wit, county taxes, township taxes, city taxes, school taxes, road taxes, borough taxes and poor taxes and the Thomas Colliery Company and other local mining corporations pay taxes to the Commonwealth upon capital stock, in which the value of coal lands is considered, in fixing its value."

The distinction is pointed out in *Coe v. Errol*, *supra* (116 U. S. 517), at page 525 (29 L. Ed. 715), at page 718, where the Court said:

"Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction and liable to taxation there, *if not taxed by reason of their being intended for exportation*, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the State.

"Of course they cannot be taxed as exports; that is to say, they cannot be taxed by reason or because of their exportation or *intended exportation*; for that would amount to laying a duty on exports, and would be a plain infraction of the constitution, which prohibits any state, without the consent of Congress, from laying any imposts or duties on imports or exports; and although it has

been decided—*Woodruff v. Parham*, 8 Wall. 123, 19 L. Ed. 382—that this clause relates to imports from and exports to foreign countries, yet, when such imposts or duties are laid on imports or exports from one state to another it cannot be doubted that such an imposition would be a regulation of commerce among the states and therefore void as an invasion of the exclusive power of Congress. See *Walling v. Michigan* [ANTE 446 (L. Ed. 691)], decided at the present term, and cases cited in the opinion in that case. But if such goods are not taxed as exports nor by reason of their exportation or intended exportation, but are taxed as a part of the general mass of property in the state, at the regular period of assessment for such property and in the usual manner, they not being in course of transportation at the time, is there any valid reason why they should not be taxed? Although intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion for some place out of the state or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the state? If assessed in an exceptional time or manner because of their anticipated departure, they might well be considered as taxed by reason of their exportation or intended exportation; but if

assessed in the usual way, when not under motion or shipment, we do not see why the assessment may not be valid and binding."

In the case at bar, the coal, unlike the logs in *Coe v. Errol*, is taxed as an export or intended export or article of interstate commerce because the tax is not assessed until the coal is "ready for market or shipment", and thus separated from the general mass of property in the State by reason of the fact that it is "ready for market or shipment" and that "market" is eighty per cent. outside of the taxing State, as in *Lemke v. Grain Company, supra*.

The case at bar is to be distinguished from *Coe v. Errol, supra*, because it is within the very exception stated in the opinion by the words "if not taxed by reason of their being intended for exportation.". The tax on anthracite coal is, we submit, levied by reason of its being intended for exportation. This appears from statements quoted from the Legislative Journal as well as from the words of the Statute itself, in connection with the fact that a large quantity of coal which is produced but not shipped to market is not taxed.

It is of no consequence in determining the validity of the Statute here involved that a small proportion of the anthracite coal when prepared

for market was intended for market in Pennsylvania.

The same was true in the case of *Lemke v. The Grain Company*, *supra*.

In *United Fuel Gas Company v. Hallanan*, No. 276, October Term, 1921, decided December 12, 1921, 257 U. S. 277, at page 280 Advance Opinions No. 5 of January 16, 1922, L. Ed., at page 136, this Court said:

"The case was heard upon the pleadings and a stipulation as to facts. It appears that the plaintiff gathers and purchases natural gas, mostly in West Virginia, and distributes it through its pipes, which extend to or beyond the state line in various places, and also connect with the pipes of other companies that extend beyond the state. The total amount dealt with by the plaintiff in the year ending July 1, 1919, was 54,973,588 M cubic feet, of which all but a little over a million M cubic feet was gathered in West Virginia. There were sold directly to consumers in West Virginia 11,590,656 M cubic feet; a little over 10,000,000 M cubic feet to consumers in other states; and the remainder was sold to four connecting companies. It is admitted that the gas sold to one of these, the Ohio Fuel Supply Company, is transported in interstate commerce, so that that may be laid on one side. Another of them is the Columbia Gas & Electric Company. Ninety-nine per cent. of the gas received by

it is carried out of the state and sold, yearly. A third is the Pittsburgh-West Virginia Gas Company, which yearly disposes of 88 per cent. of the gas in the same way. The fourth is the Hope Natural Gas Company, which in like manner carries 67 per cent. of the gas bought from the plaintiff out of the state and sells it there.

In short, the great body of the gas starts for points outside the state and goes to them. That the necessities of business require a much smaller amount destined to points within the state to be carried undistinguished in the same pipes does not affect the character of the major transportation. Neither is the case as to the gas sold to the three companies changed by the fact that the plaintiff, as owner of the gas, and the purchasers, after they receive it, might change their minds before the gas leaves the state, and that the precise proportions between local and outside deliveries may not have been fixed, although they seem to have been. The typical and actual course of events marks the carriage of the greater part as commerce among the states, and theoretical possibilities may be left out of account. There is no break, no period of deliberation, but a steady flow, ending, as contemplated from the beginning, beyond the state line."

The same proposition was affirmed in the case of *Crew Levick Company vs. Pennsylvania*, 245 U.S. 292.

The case of *Crescent Oil Company v. Mississippi*, decided by this Court November 14, 1921, 257 U. S. 129, Advance Opinions L. Ed. No. 2 of December 1, 1921, page 55, referred to in the prevailing opinion in the Court below has no bearing on the question at issue here. There, the Statute in question forbade a corporation from ginning cotton if at the same time it was interested in the manufacture of cotton-seed oil or meal. The mere fact that some of the cotton ginned might enter interstate commerce obviously could have no effect on a statute declaring it to be against the public policy of the State for a corporation to engage in two conflicting activities. If the attempt had there been to impose a burden of taxation upon the cotton ginned after its manufacture had been completed and it was prepared and "ready for shipment" to other states to the extent of eighty per cent. thereof, the case might have some bearing on the case at bar, particularly if the State of Mississippi had a natural monopoly in the production of cotton as Pennsylvania has in the production of anthracite coal.

In conclusion, we respectfully submit that the Pennsylvania Statute in question in this case, by its terms and by its application to the admitted facts of the case is an attempt to impose a tax

upon interstate commerce and upon exports from the State of Pennsylvania, and as such is unconstitutional. The second and third assignments of error should therefore be sustained and the decree of the Supreme Court of Pennsylvania reversed.

The Act of Assembly of the Commonwealth of Pennsylvania of May 11, 1921 (P. L., 479) is void because it is in conflict with the Fourteenth Amendment (First Assignment of Error; Record, p. 157).

The petitioners desire to point out and emphasize that the coal in question has already borne its portion of ordinary taxation as a part of the mass of property in the Commonwealth of Pennsylvania. This is the kind of tax which was upheld in *Coe v. Errol*, 116 U. S. 517. In this case we have an *additional* tax imposed upon anthracite coal alone at the moment when it is ready for market or shipment. The selection of such anthracite coal to bear that burden (to the exclusion of anthracite coal not so prepared and of all bituminous coal) takes the property of the appellant without due process of law and denies to him the equal protection of the laws in violation of the Fourteenth Amendment. This aspect of the tax is fully presented in the brief and argument of the appellant. The petitioners desire to adopt

and rely upon that brief and argument without restating it.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1922.

No. 541.

ROLAND C. HEISLER, PLAINTIFF IN ERROR,

v.

THOMAS COLLIERY COMPANY ET ALS., DEFENDANTS IN ERROR.

BRIEF OF THE ATTORNEY GENERAL OF MASSACHUSETTS AS AMICUS CURIAE.
ON BEHALF OF THE PEOPLE OF MASSACHUSETTS AND THE OTHER NEW-ENGLAND STATES AND OF NEW YORK, NEW JERSEY AND DELAWARE.
STATEMENT OF THE CASE.

The facts in this case are few and simple.

1. The plaintiff is the owner and registered holder of twenty-eight shares of stock of the Thomas Colliery Company, a corporation organized under the laws of Pennsylvania, which owns and operates an anthracite colliery and coal mines at Shenandoah, Pennsylvania. (Rec., p. 24.)

2. Anthracite coal is found in only nine counties in Pennsylvania. (Rec., p. 26.)

3. The total production of anthracite coal in the United States in 1920 was 78,842,000 gross tons, all of which was produced in Pennsylvania. (Rec., p. 27.)

4. Coal in place is assessed at its full value as land and all local taxes levied thereon, to wit, county taxes, township taxes, city taxes, school taxes, road taxes, borough taxes and poor taxes, and the Thomas Colliery Company and other coal mining corporations pay taxes to the Commonwealth upon capital stock, in which the value of coal lands is considered, in fixing its value. (Rec., p. 27.)

5. Of all the said grades of coal found in Pennsylvania a very large proportion is exported to other States and Territories of the United States and to foreign countries. Approximately 80 per centum of the total production of anthracite coal is shipped, sold and used as fuel outside of the Commonwealth of Pennsylvania. (Rec., p. 27.)

6. Of the anthracite coal prepared for market by the Thomas Colliery Company, approximately 67 per centum is sold and shipped outside of the Commonwealth of Pennsylvania, and a considerable proportion is sold and shipped to foreign countries. (Rec., p. 27.)

7. An Act of the General Assembly, approved May 11, 1921, provides in part as follows:

"SECTION 1. Be it enacted, &c., That from and after the passage of this act, each and every ton of anthracite coal, of the weight of two thousand two hundred and forty (2,240) pounds avoirdupois, mined, washed, screened, or otherwise prepared for market in this Commonwealth, shall be made subject to a tax of one and one-half per centum ($1\frac{1}{2}$) of the

value thereof when prepared for market, which said tax shall be assessed at the time when said coal has been mined, washed or screened, and is ready for shipment or market.

SECTION 2. It shall be the duty of the individual, or the superintendent or other officer, in charge of any mine or mines, or washery, or operation, to assess the tax hereby imposed, from time to time, as the coal is mined, washed, or screened, and is ready for shipment or market . . ."

8. Tables prepared by governmental agencies show that about 50 per centum of the total amount of anthracite coal shipped from Pennsylvania, that is to say, about 40,000,000 tons, goes to New York, New Jersey and the New England States; and that the average value of a ton of anthracite coal prepared for shipment is about six dollars.

9. As the special tax levied by Pennsylvania necessarily falls upon the consumer, and amounts to about 9 cents per ton, it is apparent that the necessary operation of the act is to compel the inhabitants of New York, New Jersey and New England to pay about \$3,600,000 annually to the State of Pennsylvania upon coal shipped to them in interstate commerce.

10. That this was the purpose and result consciously foreseen and intended by the Legislature of Pennsylvania at the time when the act was passed appears from the following excerpts from the legislative journal.

"We quote the words of Governor Sproul of Pennsylvania in his message to the Pennsylvania Legislature as follows:

(Pennsylvania Legislative Journal, Session 1921, issue of January 18, 1921, at p. 34):

"Perhaps the most practicable plan, in that the slight burden it would impose would be very widely distributed and a large proportion of it would come from beneficiaries of

Pennsylvania's natural resources living elsewhere, would be found in a small *ad valorem* tax upon coal.'

'The tax upon coal, if administered as outlined above, would in itself, come near to meeting our reasonable requirements. It should be accompanied by legislation which would prevent the addition of larger sums than were actually paid to the costs of coal to the consumer as a compensation for taxes. This will prevent any gouging of the public or any excuses regarding the "costs of collection".'

Mr. Williams when introducing the measure into the Pennsylvania Legislature, said:

(Pennsylvania Legislative Journal, Issue of April 20, 1921, p. 2488):

Mr. Williams: Mr. Speaker, I desire to say that this is one of the revenue measures suggested by the Governor—a tax on anthracite coal. As it was originally introduced it called for a tax of two and one-half per centum, but it has been amended and reduced to one and one-half per centum per ton.

On the basis of six dollars per ton, on the coal mined during 1920, the tax at one and one-half cents per ton would have amounted to \$8,067,000. Eighty per cent. of that would have been paid by people living outside of the State of Pennsylvania, which would have left \$1,600,000 of this tax to have been paid by people within the State.

Twenty-eight per cent. of the anthracite coal mined in the State of Pennsylvania is shipped to New York and tide-water points; ten per cent. to New England points; ten per cent. to points on the Great Lakes; ten per cent. to Canada; twenty per cent. is used in the State of Pennsylvania, with scattering amounts in other states. Now, gentlemen, this great natural resource of the State of Pennsylvania is fast being depleted, and if the State of Pennsylvania is

ever to get any revenue from hard coal, it must begin now. The revenue from this source is needed to meet the increased cost to the State of the teachers salary bill."

11. The plaintiff's bill to restrain the collection of this tax having been dismissed by the Supreme Court of Pennsylvania (Rec., p. 141), he sues out this writ of error, and assigns as error the following (Rec., p. 157):

1. That the statute is in conflict with the Fourteenth Amendment to the Federal Constitution.

2. That the statute is in conflict with the commerce clause (art. I, § 8, cl. 3) of the Federal Constitution.

3. That the statute in effect imposes an invalid duty on exports, in violation of U. S. Const., art. I, § 9, cl. 5.

As the first assignment of error will be argued by counsel for the plaintiff in error, we shall adopt and rely upon that argument.

This brief will present the second and third assignments.

The fundamental issue is whether Pennsylvania can, in effect, impose a tax on the people of other states. Pennsylvania has a natural monopoly of anthracite coal. There are no anthracite mines outside that state. Eighty per cent. of this coal is shipped outside of Pennsylvania. Fifty per cent. goes to the northeastern states. Their climate makes anthracite coal one of the prime necessities of life, especially for domestic use. *This coal has already borne its fair burden of ordinary taxation.* It has paid real estate taxes at full value, county taxes, township taxes, city taxes, school taxes, road taxes, borough taxes, and poor taxes, and the coal mining corporations have paid taxes to the Commonwealth upon their stock, in which the value of coal lands is considered, in fixing its value. (Par. 14, Rec.,

p. 27.) At the moment when this coal "is ready for shipment or market" Pennsylvania collects a *special and additional ad valorem tax*. No similar tax is imposed upon other goods. No similar tax is even imposed upon bituminous coal where Pennsylvania has competition. (Par. 12, Rec., p. 27.)

While this special tax is collected from the colliery, it must be ultimately borne by the consumers in other states who receive this coal in interstate and foreign commerce. As a result they will pay approximately \$6,000,000 toward the support of Pennsylvania. Of this amount about \$3,600,000 will be borne by the northeastern states. This burden Pennsylvania is able to impose *because it has a natural monopoly of this kind of coal*. This was the purpose of the act, openly declared in connection with its passage. The necessary operation of the act shows that, if upheld, it will achieve the purpose so declared. Even assuming that the tax is imposed at the last moment before the coal has begun to move in interstate commerce, we say that such is not the test to be applied to a *special tax* imposed under these circumstances. As to all anthracite coal shipped out of the state, this tax is in effect an *ad valorem* export duty, designed to collect from the inhabitants of other states about \$6,000,000 for the State of Pennsylvania. If so, it is a direct burden on interstate commerce which cannot be sustained on the ground that it is imposed at the instant before the coal begins to move.

ARGUMENT.

I.

Article I, section 8, clause 3, of the United States Constitution provides:

"The congress shall have power — . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

No argument is now needed to establish either that this provision is supreme and exclusive or that the states cannot directly regulate or burden interstate commerce.

Gibbons v. Ogden, 9 Wheat. 1.

Thus, a state cannot tax property which is moving in interstate commerce.

Kelley v. Rhoads, 188 U. S. 1.

And even the undoubted power of the states to regulate local commerce within their own borders yields, in case of conflict, to the paramount power of Congress to regulate commerce among the several states.

Northern Pacific Ry. v. Washington, 222 U. S. 370.

Minnesota Rate Cases, 230 U. S. 352.

Erie R. R. Co. v. New York, 233 U. S. 671.

Houston & Texas Ry. v. United States, 234 U. S. 342.

New York Central R. R. Co. v. Winfield, 244 U. S. 147.

Hence, if a local rate creates a discrimination in comparison with the interstate rate, the offending local rate may be annulled by Federal authority, although the regulation of local commerce is ordinarily beyond the Federal jurisdiction.

Minnesota Rate Cases, 230 U. S. 352.

Houston & Texas Ry. v. United States, 234 U. S. 342.

Railroad Commission of Wisconsin v. Chicago, B. & Q. R. R., 42 Sup. Ct. 232.

New York v. United States, 42 Sup. Ct. 239.

The latter cases are peculiarly significant in relation to the present cause. They establish the principle that the line between interstate commerce and local affairs is not a fixed and unchanging one. On the contrary, it is so drawn that *under the particular circumstances* interstate commerce shall be free from injurious exercise of state powers *even upon matters ordinarily within the exclusive jurisdiction of the state.*

II.

The question whether a state law is permissible regulation of local affairs or a forbidden regulation of interstate commerce does not depend upon whether that law purports to regulate interstate commerce *eo nomine* or by express words. On the contrary, it depends upon the actual operation of the law upon interstate commerce under the particular circumstances. In a sense, the powers reserved by the Tenth Amendment to the states or to the people, and the powers granted by the Constitution to the United

States, stand opposed to each other. Each must operate within its own sphere. Thus, neither the state police power nor the power of the state to tax persons and things within its jurisdiction may be so exerted as to regulate or burden interstate commerce directly.

Western Union Tel. Co. v. Foster, 247 U. S. 105, 114.

Western Union Tel. Co. v. Kansas, 216 U. S. 1.

So, also, neither the Federal power to regulate commerce nor the Federal power to tax may be so exerted as to regulate directly the internal affairs of the states.

Hammer v. Dagenhart, 247 U. S. 251.

Bailey v. Drexel Furniture Co., 42 Sup. Ct. 449.

Hill v. Wallace, 42 Sup. Ct. 453.

On the other hand, the remote and incidental effects flowing from the lawful exercise of a given power upon matters within its lawful scope may spread to things upon which that power could not lawfully be directly exercised without rendering such exercise invalid or improper. In other words, the question whether the exercise of state powers upon matters within their apparent scope is in fact a direct burden upon or regulation of interstate commerce, and is therefore forbidden, or merely remotely and incidentally affects such commerce and is therefore permitted, is frequently one of degree. The dividing line "is to be pricked out by the gradual contact of opposing decisions."

See *Noble State Bank v. Haskell*, 219 U. S. 104, 112.

III.

The question whether a state tax directly burdens interstate commerce and so is forbidden, or remotely and incidentally affects it and is therefore permitted, depends upon the particular circumstances. The power of the state to tax persons and things within its jurisdiction is far reaching. Even a remote and incidental burden thereby imposed upon interstate commerce will not defeat the tax. Thus, the power of a state to impose *ordinary* and *general* property taxes *without discrimination* upon the mass of property within its borders extends to the whole mass even though some portion of that mass has come from other states or is about to be shipped into other states.

Brown *v.* Houston, 114 U. S. 622.

Coe *v.* Errol, 116 U. S. 517.

Pittsburg etc. Coal Co. *v.* Bates, 156 U. S. 577.

Diamond Match Co. *v.* Ontonagon, 188 U. S. 82.

American Steel & Wire Co. *v.* Speed, 192 U. S. 500.

General Oil Co. *v.* Crain, 209 U. S. 211.

Bacon *v.* Illinois, 227 U. S. 504.

Susquehanna Coal Co. *v.* South Amboy, 228 U. S. 665.

The test as to whether *this class of taxes* burdens interstate commerce is whether the goods are at rest within the state. If they have not begun to move in interstate commerce —

Coe *v.* Errol, 116 U. S. 517,

Diamond Match Co. *v.* Ontonagon, 188 U. S. 82,

or if the interstate movement is complete, such property taxes may be levied.

Brown v. Houston, 114 U. S. 622.

Pittsburgh, etc., Coal Co. v. Bates, 156 U. S. 577.

American Steel & Wire Co. v. Speed, 192 U. S. 500.

General Oil Co. v. Crain, 209 U. S. 211.

Bacon v. Illinois, 227 U. S. 504.

Susquehanna Coal Co. v. South Amboy, 228 U. S. 665.

It may be observed that a different rule would exempt from the general taxes ordinarily levied upon personal property a large mass of property either because it had once moved in interstate commerce or might so move in the future.

But the very cases which uphold *ordinary property taxes* upon property at rest within the state recognize that *no special or discriminatory tax* may be imposed either *because the goods have been shipped into the state or are about to be shipped out of it*.

Thus, in *Brown v. Houston*, *supra*, this court said, by Bradley, J., at p. 633:

"Of course the assessment should be a general one, and not discriminative between goods of different States. The taxing of goods coming from other States, as such, or by reason of their so coming, would be a discriminating tax against them as imports, and would be a regulation of interstate commerce, inconsistent with that perfect freedom of trade which Congress has seen fit should remain undisturbed."

Again, in *Coe v. Errol*, *supra*, this court said, by Bradley, J., at pp. 525, 527:

"When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepôt for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction, and liable to taxation there, *if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the State.* (Italics ours.)

This court, as before stated, has since held that goods transported from one State to another are not imports or exports within the meaning of the prohibitory clauses before referred to; and it has also held that such goods, having arrived at their place of destination, may be taxed in the State to which they are carried, if taxed in the same manner as other goods are taxed, and not by reason of their being brought into the State from another State, nor subjected in any way to unfavorable discrimination. *Woodruff v. Parham*, 8 Wall. 123; *Brown v. Houston*, 114 U. S. 622."

In *Pittsburgh, etc., Coal Co. v. Bates*, *supra*, this court said, by Field, J., in respect to *Brown v. Houston*, at p. 589:

"And the court held that it could not be seriously contended, at least in the absence of any congressional legislation to the contrary, that goods which are the product of other States are to be free from taxation in the State to

which they might be carried for use or sale. And it may be added that the correct rule is for the assessor or tax collector to assess all property found within his jurisdiction, being there for the purpose of remaining till used or sold, and constituting part of the great mass of the general property of the country, provided always that the assessment does not discriminate between the products of different States."

In *Diamond Match Co. v. Ontonagon*, *supra*, this court quoted with approval from *Coe v. Errol*, already set forth above.

In *American Steel & Wire Co. v. Speed*, *supra*; the prohibition against discrimination between domestic property and property shipped into the state was fully recognized. (p. 522)

So also in *Bacon v. Illinois*, *supra*, this court said, by Hughes, J., at p. 517:

"Thus goods within the state may be made the subject of a *non-discriminatory* tax though brought from another state and held by the consignee for sale in the original packages." (*Italics ours.*)

These cases, therefore, go no farther than to sustain the imposition of the *ordinary property* taxes described in paragraph 14 of the findings (Rec., p. 27), *which taxes had already been levied and paid when the special tax here in question was imposed. These very cases condemn a special and discriminatory tax, even though the goods are at rest within the state and so included in the general mass of property therein, if such tax be imposed because the goods come from other states or are about to be shipped into other states.*

There is ample authority to sustain the distinction between the *general* ordinary and non-discriminatory

property tax and the *special* tax intended to discriminate against goods because of their relation to interstate commerce.

Thus, a general and non-discriminatory tax upon selling goods which have become part of the general mass of property within the state is valid.

Emert *v.* Missouri, 156 U. S. 296.

See also Woodruff *v.* Parham, 8 Wall. 123.

But a special tax upon "goods, wares and merchandise which *are not the growth, produce or manufacture of this state*" is void, as a discrimination against interstate commerce, even though the goods have become a part of the general mass of property within the state.

Welton *v.* Missouri, 91 U. S. 275, 282.

Cook *v.* Pennsylvania, 97 U. S. 566, 573.

Guy *v.* Baltimore, 100 U. S. 434, 439.

Webber *v.* Virginia, 103 U. S. 344, 350.

Walling *v.* Michigan, 116 U. S. 446, 456.

Minnesota *v.* Barber, 136 U. S. 313, 324.

I. M. Darnell, etc., Co. *v.* Memphis, 208 U. S. 113, 121.

New York Trust Co. *v.* Eisner, 256 U. S. 345, 348, *semble*.

Bethlehem Motors Corp. *v.* Flynt, 256 U. S. 421, 426.

The reason for the rule is thus stated in Darnell *v.* Memphis, *supra*, at p. 121, in a quotation adopted with approval from Guy *v.* Baltimore, *supra*, at pp. 439, 440:

"In view of these and other decisions of this court, it must be regarded as settled that no State can, consistently with

the Federal Constitution, impose upon the products of other States, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory. If this were not so, it is easy to perceive how the power of Congress to regulate commerce with foreign nations and among the several States could be practically annulled, and the equality of commercial privileges secured by the Federal Constitution to citizens of the several States be materially abridged and impaired."

In *Philadelphia S. S. Co. v. Pennsylvania*, 122 U. S. 326, a tax upon the *gross* receipts of corporations engaged in commerce *payable every six months* was sought to be upheld in respect to the receipts of a steamship company upon the ground that such receipts had become part of the general mass of property in the state. In overruling this contention and holding the tax invalid, this court said, by Bradley, J., p. 341:

"This reasoning seems to have much force. But is the analogy to the case of imported goods as perfect as is suggested? When the latter become mingled with the general mass of property in the state, they are not followed and singled out for taxation as imported goods, and by reason of their being imported. If they were, the tax would be as unconstitutional as if imposed upon them whilst in the original packages. When mingled with the general mass of property in the state they are taxed in the same manner as other property possessed by its citizens, without discrimination or partiality. We held in *Welton v. Missouri*, 91 U. S. 275, that goods brought into a state for sale, though they thereby become a part of the mass of its property, cannot be taxed by reason of their being introduced into the state, or because they are the products of another state. To tax them as such

was expressly held to be unconstitutional. The tax in the present case is laid upon the gross receipts for transportation as such. Those receipts are followed and caused to be accounted for by the company, dollar for dollar. It is those specific receipts, or the amount thereof (which is the same thing), for which the company is called upon to pay the tax. They are taxed not only because they are money, or its value, but because they were received for transportation. No doubt a ship-owner, like any other citizen, may be personally taxed for the amount of his property or estate, without regard to the source from which it was derived, whether from commerce, or banking, or any other employment. But that is an entirely different thing from laying a special tax upon his receipts in a particular employment. If such a tax is laid, and the receipts taxed are those derived from transporting goods and passengers in the way of interstate or foreign commerce, no matter when the tax is exacted, whether at the time of realizing the receipts, or at the end of every six months or a year, it is an exaction aimed at the commerce itself, and is a burden upon it, and seriously affects it."

See also *Galveston, Harrisburg, etc. Ry. v. Texas*, 210 U. S. 217.

Grew Levick Co. v. Pennsylvania 245 U.S.

In principle the cases just considered govern the case at bar. It is true that many of them condemn what is in effect a special discriminatory tax on goods shipped into the state, levied *after those goods have become a part of the general mass of property within the state* by reason of such interstate shipment, while the case at bar concerns a tax which, we contend, is imposed upon goods about to be shipped out of the state *by reason of such interstate or foreign shipment*. But that distinction cannot avail even if it be pressed. What is condemned is a discrimination *because of interstate shipment* whether the movement be into the state

or out of the state. Outward movement is as much within the protection of the commerce clause as inward movement.

Coe v. Errol, 116 U. S. 517, 525, 527.

Diamond Match Co. v. Ontonagon, 188 U. S. 82, 94.

Almy v. California, 24 How. 169.

Fairbank v. United States, 181 U. S. 283.

United States v. Hvoslef, 237 U. S. 1.

Thames & Mersey etc. Ins. Co. v. U. S. 237 U. S. 19.

New York & Cuba Mail S. S. Co. v. U. S. 125 Fed. 320.

Even if it be assumed, without conceding, that this tax is imposed upon this coal while it is still a part of the general mass of property in Pennsylvania, and before it has actually begun to move in interstate commerce to other states or foreign countries, the tax is none the less void *if in fact it operates as a discrimination against such outward moving commerce.*

As the tax is imposed directly upon the coal at the moment before shipment, it is unnecessary to argue at length the proposition that the tax is not upon the coal, but upon some person or thing which the state could lawfully tax. It is enough to point out that such devices have been uniformly condemned by this court, if in fact the tax ultimately must be borne by the goods. Thus, a tax upon the person who sells the goods is a tax upon the goods.

Brown v. Maryland, 12 Wheat. 419, 444-448.

Welton v. Missouri, 91 U. S. 275.

Davis v. Virginia, 236 U. S. 697.

So also a discriminatory charge made for the use of a wharf ultimately falls upon the goods and is equally condemned.

Guy v. Baltimore, 100 U. S. 434.

So also a special and burdensome license tax imposed upon maintaining an office for the transaction of interstate commerce cannot be upheld.

Rosenberger v. Pacific Express Co., 241 U. S. 48.

And special burdens imposed upon foreign corporations engaged in interstate commerce as a condition to suit upon interstate accounts cannot be sustained.

Sioux Remedy Co. v. Cope, 235 U. S. 197.

Similarly, a stamp tax imposed upon *all* bills of lading, manifests, charter parties or policies of marine insurance is void as to such documents used in interstate or foreign commerce.

United States v. Hvoslef, 237 U. S. 1.

Thames & Mersey etc. Ins. Co. v. U. S. 237 U. S. 19.

New York etc. S. S. Co. v. United States, 125 Fed. 320.

and is doubly bad if it is specifically directed at the documents used in such commerce.

Almy v. California, 24 How. 169.

Fairbank v. United States, 181 U. S. 283.

In connection with the stamp tax cases it may be observed that the goods *had not started upon their foreign journey*, but the tax was overthrown notwithstanding because it inevitably imposed a burden upon interstate or foreign commerce *whether the goods had already started or not*. Thus, in *United States v. Hvoslef*, 237 U. S. 1, the court said, at p. 18:

"The same principle governs that has constantly been held to obtain in cases where it has been sought to give effect to taxes upon interstate commerce under general legislation of the States. In *Robbins v. Shelby County*, *supra*, it was strongly urged, 'as if it were a material point in the case,' that no discrimination was made 'between domestic and foreign drummers' — that is, between those of the State whose legislation was in question and those of other States; that all were taxed alike. But the court held that this did not meet the difficulty, inasmuch as interstate commerce could not 'be taxed at all, even though the same amount of tax should be laid on domestic commerce.' This had been decided, as the court pointed out, in the case of *The State Freight Tax*, 15 Wall. 232; and it has become one of the commonplaces of constitutional law. See *Brennan v. Titusville*, 153 U. S. 289, 304; *Caldwell v. North Carolina*, 187 U. S. 622, 629; *Rearick v. Pennsylvania*, 203 U. S. 507, 510; *Crenshaw v. Arkansas*, 227 U. S. 389. We know of no ground upon which a different effect can be given to the explicit constitutional provision which denies to Congress the right to tax exportation from the States.

There is a further objection that the goods were not on the vessel at the time the charter party was made, but as the charters related only to the exportation this objection is plainly without merit."

That the essential test is whether the tax *in fact* burdens interstate commerce, even though in terms laid upon some privilege or thing which the state has un-

questioned jurisdiction to tax is well illustrated by those cases which hold that where a foreign corporation is doing both local and interstate business, the state cannot impose a license fee for doing local business in such a manner or in such amount that it burdens the interstate business.

Western Union Tel. Co. v. Kansas, 216 U. S. 1.

Pullman Co. v. Kansas, 216 U. S. 56.

Ludwig v. Western Union Tel. Co., 216 U. S. 146.

International Paper Co. v. Massachusetts, 246 U. S. 135.

The principle is thus declared in *Western Union Tel. Co. v. Kansas*, *supra*, at p. 30:

"Looking, then, at the natural and reasonable effect of the statute, disregarding mere forms of expression, it is clear that the making of the payment by the Telegraph Company, as a charter fee, of a given per cent of its authorized capital, representing, as that capital clearly does, all of its business and property, both within and outside of the State, a condition of its right to do local business in Kansas, is, in its essence, not simply a tax for the privilege of doing local business in the State, but a burden and tax on the company's interstate business and on its property located or used outside of the State. The express words of the statute leave no doubt as to what is the basis on which the fee, specified in the state statute, rests. That fee, plainly, is not based on such of the company's capital stock as is represented in its local business and property in Kansas. The requirement is a given per cent of the company's authorized capital, that is, all its capital, wherever or however employed, whether in the United States or in foreign countries, and whatever may be the extent of its lines in Kansas as compared with

its lines outside of that State. What part of the fee exacted is to be attributed to the company's domestic business in Kansas and what part to interstate business, the State has not chosen to ascertain and declare in the statute. It strikes at the company's entire business wherever conducted and its property wherever located, and, in terms, makes it a *condition* of the telegraph company's right to transact purely local business in Kansas that it shall contribute for the benefit of the state school fund a given per cent of its whole authorized capital, representing all of its property and all its business and interests everywhere."

If these cases are considered in connection with the cases already cited to the effect that a state cannot exert its undoubted power to regulate local rates in such a manner as to interfere with national regulation of interstate rates (*New York v. United States*, 42 Sup. Ct. 239), it is plain that if this tax does *in fact* burden interstate commerce the exaction of it before the goods have begun to move (if that be the fact) cannot save it. This is perhaps simply another way of saying that a state cannot *discriminate* against interstate commerce even by exerting its undoubted powers upon matters clearly within its jurisdiction.

IV.

Apply these principles to the present case. Pennsylvania has a natural monopoly of anthracite coal in this country. That coal is a prime necessity of life, especially in the northeastern states. Eighty per cent of such coal is shipped out of Pennsylvania. The Thomas Colliery so ships sixty-seven per cent of its anthracite. (Par. 16, Rec., p. 27.) It is therefore a proper party to present this question here.

The declared intention at the time this act was passed was so to use the natural monopoly which Pennsylvania possesses as to compel the inhabitants of other states to pay a tax to Pennsylvania by collecting a special tax from the colliery which would inevitably pass such tax on to the consumer.

See *Corry v. Baltimore*, 196 U. S. 466.

In order to avoid constitutional difficulties so far as might be, the act provides that the tax shall be imposed when the coal "is ready for shipment or market." The plain intention was to invoke (if possible) the rule that a state may impose *ordinary property taxes, which do not discriminate against interstate commerce* up to the moment when the coal begins to move in commerce. As a practical matter, the tax would have exactly the same operation and effect, so far as coal shipped out of the state is concerned, if it had been exacted at the boundary line of the state as an express export duty. The selection of the moment before the coal moves (if that moment has been effectively selected) is a plain and intentional fraud upon the commerce clause.

Cf. *Hammer v. Dagenhart*, 247 U. S. 251.

Cf. *Bailey v. Drexel Furniture Co.*, 42 Sup. Ct. 449.

Cf. *Hill v. Wallace*, 42 Sup. Ct. 453.

As this coal has already borne its full share of ordinary, *non-discriminatory* property taxes (which are the kind of taxes permitted by *Coe v. Errol*, 116 U. S. 517) to sustain this *additional and discriminatory tax imposed upon anthracite coal alone* would permit the holder of a natural monopoly to use the channels of interstate

commerce to tax persons in other states to the extent of about \$6,000,000 a year, of which about \$3,600,000 will be paid by the states which here protest as *amici curia*. Under these circumstances, we earnestly contend that Pennsylvania cannot shelter itself behind the rule that *ordinary* taxes may be levied up to the moment when the goods begin to move in commerce. The *special* tax at bar is plainly a discrimination against interstate commerce and should be condemned as such.

The contention that this act does not discriminate against interstate commerce because all anthracite coal is taxed, whether shipped out of Pennsylvania or not, cannot prevail. The act is not a general act applicable to *all goods* when ready for shipment or market. It does not even embrace bituminous as well as anthracite coal. There is no escape from the conclusion that because of the monopoly which Pennsylvania has, and the fact that eighty per cent of all anthracite coal is shipped out of Pennsylvania the act does directly affect interstate and foreign commerce, and in effect collects a tax from citizens of other states through the channels of that commerce. If so, the fact that all anthracite is included cannot save the act.

State Freight Tax Case, 15 Wall. 232.

Robbins v. Shelby County Taxing District,
120 U. S. 489, 497.

Minnesota v. Barber, 136 U. S. 313, 319.

Brimmer v. Rebman, 138 U. S. 78, 81.

Western Union Tel. Co. v. Kansas, 216 U. S.
1, 29.

United States v. Hvoslef, 237 U. S. 1, 17, 18.

The question at issue extends far beyond the validity or invalidity of the particular tax in question. It will establish a far reaching principle for good or ill. If the tax be upheld, it is inevitable that every state which possesses natural resources essential to other states will impose similar taxes in order to make those whom it cannot *directly* and constitutionally tax contribute to its exchequer through the channels of commerce. Indeed, several states may combine so as to create absolute monopolies by the enactment of uniform laws exacting taxes similar to this. Such a situation would bring back the commercial conflicts between the states which the commerce clause was enacted to prevent. A result so absolutely repugnant to both the letter and the purpose of the commerce clause ought not to be permitted.

CONCLUSION.

The act in question should be declared unconstitutional and the decree of the Supreme Court of Pennsylvania should be reversed.

Respectfully submitted,

J. WESTON ALLEN,

*Attorney General for the
Commonwealth of Massachusetts.*

EDWIN H. ABBOT, JR.,

Assistant Attorney General.

Supreme Court of the United States,

OCTOBER TERM, 1922.

No. 541.

ROLAND C. HEISLER,
Plaintiff in Error,

v.

THOMAS COLLIERY COMPANY, *et als.*,
Defendants in Error.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIÆ.

Now come the State of New York by its Attorney General, Charles D. Newton; the State of New Jersey by its Attorney General, Thomas F. McCran; the Commonwealth of Massachusetts by its Attorney General, J. Weston Allen; the State of Maine by its Attorney General, Ransford W. Shaw; the State of New Hampshire by its Attorney General, Oscar L. Young; the State of Vermont by its Attorney General, Frank C. Archibald; the State of Rhode Island by its Attorney General, Herbert Ambrose Rice; the State

of Connecticut by its Attorney General, Frank E. Healy; and the State of Delaware by its Attorney General, Sylvester D. Townsend, Jr., and move the court for leave to file in the above entitled cause the brief herewith exhibited.

The suit to which this motion relates brings in question the constitutionality of a statute of the Commonwealth of Pennsylvania levying a tax upon anthracite coal when "mined, washed, screened, or otherwise prepared for market". The statute is in part as follows:

"SECTION 1. Be it enacted, &c., That from and after the passage of this act, each and every ton of anthracite coal, of the weight of two thousand two hundred and forty (2,240) pounds avoirdupois, mined, washed, screened, or otherwise prepared for market in this Commonwealth, shall be made subject to a tax of one and one-half per centum ($1\frac{1}{2}$) of the value thereof when prepared for market, which said tax shall be assessed at the time when said coal has been mined, washed or screened, and is ready for shipment or market.

SECTION 2. It shall be the duty of the individual, or the superintendent or other officer, in charge of any mine or mines, or washery, or operation, to assess the tax hereby imposed, from time to time, as the coal is mined, washed, or screened, and is ready for shipment or market * * *

It appears from the record that the entire present source of supply of anthracite coal in the United States is confined to the Commonwealth of Pennsylvania. In support of their motion the petitioners show that considerably over ten per cent. of the amount of anthracite coal produced is used at the mines or sold to the local trade before it is ready for shipment and thus is not subject to the tax in question, that over eighty per cent. of the anthracite coal shipped from the mines in Pennsylvania is transported to other states and foreign countries, and that New York, New Jersey, Delaware and the New England states receive over fifty per cent. of the total amount shipped. Said percentages are based upon tables prepared from figures gathered by different governmental agencies, copies of which are annexed hereto.

The petitioners further show that the average value of a ton of anthracite coal when prepared for market is in excess of six (6) dollars, that the amount of anthracite coal sold and shipped annually to New York, New Jersey, Delaware and the New England states is about forty million tons, that the tax imposed by the statute is necessarily paid by the consumer, and that consequently the increased cost of anthracite coal to consumers in the states referred to, due to said tax, is about three million, six hundred thousand (3,600,000) dollars annually.

Furthermore your petitioners show that the purpose and effect of the statute in question was to impose a tax on anthracite coal as an export, which should be paid by consumers in other states and foreign countries. This appears not only from the language of the statute itself, interpreted in the light of the facts stated above, but also from the Governor's message urging the passage of the statute, and from the debate in the Legislature when the measure was introduced. (See Pennsylvania Legislative Journal, Session 1921, issues of January 18, 1921, at page 34, and April 20, 1921, at page 2488.)

Your petitioners further show that in the states referred to many years of use and custom have rendered anthracite coal an article of prime necessity, particularly for domestic purposes. The dependency of these states upon the Commonwealth of Pennsylvania for anthracite coal is a matter of common knowledge and of judicial notice, particularly in view of the acts of Congress recently passed calling for an investigation of the industry of anthracite coal mining.

It follows from the foregoing facts that the statute of Pennsylvania involved in this appeal necessarily imposes a direct and substantial burden upon the citizens of New York, New Jersey, Delaware and the New England states and affects generally their property rights and welfare. Ac-

cordingly this motion is filed by the Attorneys General of the several states named for those states as representative of the citizens thereof.

CHARLES D. NEWTON,
Attorney General of New York.

THOMAS F. MCCRAN,
Attorney General of New Jersey.

J. WESTON ALLEN,
Attorney General of Massachusetts.

RANSFORD W. SHAW,
Attorney General of Maine.

OSCAR L. YOUNG,
Attorney General of New Hampshire.

FRANK C. ARCHIBALD,
Attorney General of Vermont.

HERBERT AMBROSE RICE,
Attorney General of Rhode Island.

FRANK E. HEALY,
Attorney General of Connecticut.

SYLVESTER D. TOWNSEND, JR.,
Attorney General of Delaware.

PRODUCTION OF PENNSYLVANIA ANTHRACITE COAL.
ALL SIZES.

Calendar Year	Net Tons
1911.....	90,464,000
1912.....	84,362,000
1913.....	91,525,000
1914.....	90,822,000
1915.....	88,995,000
1916.....	87,578,000
1917.....	99,612,000
1918.....	98,826,000
1919.....	88,092,000
1920.....	89,598,000
1921.....	90,473,000
11 yr. Average.....	90,941,000

Figures taken from U. S. GEOLOGICAL SURVEY

PRODUCTION OF PENNSYLVANIA ANTHRACITE COAL.
ALL SIZES.

Coal Year	Net Tons
1913-1914.....	88,323,000
1914-1915.....	90,298,000
1915-1916.....	93,318,000
1916-1917.....	87,947,000
1917-1918.....	100,372,000
1918-1919.....	92,791,000
1919-1920.....	91,914,000
1920-1921.....	89,684,000
1921-1922.....	*89,733,000
9 yr. Average.....	91,598,000

* Subject to revision.

Figures taken from U. S. GEOLOGICAL SURVEY

SALE OF PENNSYLVANIA ANTHRACITE COAL.

ALL SIZES.

APRIL 1, 1916, TO MARCH 31, 1917.

	Net Tons	Percentage
Maine	634,000	.8
New Hampshire.....	526,000	.7
Vermont	397,000	.5
Massachusetts	6,033,000	7.5
Rhode Island.....	819,000	1.0
Connecticut	2,349,000	2.9
New England.....	10,758,000	13.4
New York.....	22,651,000	28.1
New Jersey.....	9,915,000	12.3
N. E., N. Y. & N. J.....	43,324,000	53.8
35 Other States & D. C...	12,503,000	15.5
Pennsylvania	13,621,000	16.9
Railroad Fuel.....	6,434,000	8.0
Exports	4,638,000	5.8
Miscellaneous	48,000	0.0
Total Sales.....	80,568,000	100.0

Data collected by Anthracite Committee of U. S. Fuel
Administration and published in
COAL IN 1917, PART B. DISTRIBUTION AND CONSUMP-
TION, BY C. E. LESHER

PRODUCTION OF PENNSYLVANIA ANTHRACITE COAL.
ALL SIZES.

1916.

	Net Tons	Percentage
Loaded at Mines for Shipment.....	75,601,000	86.3
Used at Mines for Steam & Heat...	9,761,000	11.2
Sold to Local Trade and Used by Employees	2,216,000	2.5
TOTAL	87,578,000	100.0

Figures taken from
COST REPORTS OF FEDERAL TRADE COMMISSION COAL,
No. 2,
JUNE 30, 1918.

PRODUCTION OF PENNSYLVANIA ANTHRACITE COAL.
ALL SIZES.

1917.

	Net Tons	Percentage
Loaded at Mines for Shipment.....	86,789,000	87.1
Used at Mines for Steam & Heat..	10,441,000	10.5
Sold to Local Trade and Used by Employees	2,382,000	2.4
<hr/>		<hr/>
TOTAL	99,612,000	100.0

Figures taken from
COAL IN 1918, PART A, PRODUCTION BY C. E. LESHER

PRODUCTION OF PENNSYLVANIA ANTHRACITE COAL.
ALL SIZES.

1918.

	Net Tons	Percentage
Loaded at Mines for Shipment.....	85,928,000	87.0
Used at Mines for Steam & Heat...	10,224,000	10.3
Sold to Local Trade and Used by Employees	2,674,000	2.7
TOTAL	98,826,000	100.0

Figures taken from

COAL IN 1918, PART A, PRODUCTION BY C. E. LESHER.

PRODUCTION OF PENNSYLVANIA ANTHRACITE COAL.
ALL SIZES.

1920.

	Net Tons	Percentage
Loaded at Mines for Shipment.....	76,844,000	85.8
Used at Mines for Steam & Heat...	9,858,000	11.0
Sold to Local Trade and Used by Employees	2,896,000	3.2
		<hr/>
TOTAL	89,598,000	100.0

Figures taken from U. S. GEOLOGICAL SURVEY.

PRODUCTION OF PENNSYLVANIA ANTHRACITE COAL.
ALL SIZES.

1921.

	Net Tons	Percentage
Loaded at Mines for Shipment.....	77,901,000	86.1
Used at Mines for Steam & Heat..	9,760,000	10.8
Sold to Local Trade and used by Employees	2,812,000	3.1
<hr/>		
TOTAL	90,473,000	100.0

Figures taken from U. S. GEOLOGICAL SURVEY.

THE JOURNAL OF THE

ROYAL SOCIETY

1881

THE JOURNAL OF THE
ROYAL SOCIETY
OF LONDON
PUBLISHED BY THE SOCIETY
AND BY THE
PRINTERS
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IN LONDON
AND
BY THE
PRINTERS
AND BOOKSELLERS
IN LONDON

FILED

NOV 18 1922

WM. R. STANSBURY
CLERK

In The
Supreme Court of the United States

October Term, 1922.
No. 541.

ROLAND C. HEISLER, Plaintiff in Error,

vs.

THOMAS COLLIERY COMPANY, E. HERBERT SUENDER, SUPERINTENDENT; JOHN GILBERT et al, Directors of Thomas Colliery Company, SAMUEL S. LEWIS, Auditor General of the Commonwealth of Pennsylvania, and CHARLES A. SNYDER, State Treasurer of the Commonwealth of Pennsylvania.

In Error to the Supreme Court of the State of
Pennsylvania.

BRIEF FOR DEFENDANTS IN ERROR.

EMERSON COLLINS,
Deputy Attorney General.
GEORGE ROSS HULL,
First Deputy Attorney General.
GEORGE E. ALTER,
Attorney General.
FOR DEFENDANTS IN ERROR.

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In The
Supreme Court of the United States

October Term, 1922.
No. 541.

ROLAND C. HEISLER, Plaintiff in Error,

vs.

THOMAS COLLIERY COMPANY, E. HERBERT SUENDER, SUPERINTENDENT; JOHN GILBERT et al., Directors of Thomas Colliery Company, SAMUEL S. LEWIS, Auditor General of the Commonwealth of Pennsylvania and CHARLES A. SNYDER, State Treasurer of the Commonwealth of Pennsylvania.

BRIEF FOR DEFENDANTS IN ERROR.

The decision of the Supreme Court of Pennsylvania is attacked on two grounds:-

I. That this tax on anthracite coal is invalid, under the Constitution of the United States, because it does not apply also to bituminous coal.

II. That a tax assessed on anthracite coal when it has been mined and prepared for market and prior to its being shipped or committed to a carrier for shipment, is a tax on interstate commerce.

Both of these positions are directly at variance with principles announced, over and over again, by this Court.

I.

THE SELECTION OF ANTHRACITE COAL AS A SUBJECT OF TAXATION IS NOT A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW OR A DENIAL OF THE EQUAL PROTECTION OF THE LAWS TO THOSE ENGAGED IN THAT INDUSTRY.

The reports of this Court are full of cases wherein tax legislation has been attacked, but the Court has steadily recognized the question as primarily a legislative one and sustained the legislative power to classify property for taxing purposes, refusing to disturb any classification unless manifestly arbitrary and illusory. It has re-

cognized that the taxing power is one of the essential powers of every sovereignty, to be so exercised as to promote the general welfare, and that in making classifications for tax purposes consideration may be given to questions of public policy including the encouraging of industries, the placing of burdens upon those best able to bear them and otherwise involving the exercise of the widest discretion.

With these principles in mind it is very apparent that this tax on anthracite coal is a valid exercise of legislative discretion. We have only to consider the fact that this rare product has very important characteristics peculiarly its own; that it differs from bituminous coal, strikingly, in its creation, composition and uses; that bituminous is an essential factor in great industries with which anthracite has no connection; that the production of anthracite and the production of bituminous coal are entirely separate industries, requiring separate codes of law for their regulation and inspection and the health and safety of those engaged therein, and that the two commodities always have been regarded as distinct and repeatedly so taxed by the United States and Canadian governments. To argue, in the face of all these considerations, that the separate classification of the anthracite coal industry is a violation of the Federal Constitution, is to ask this Court to change the position announced in a long line of decisions from the adoption of the 14th Amendment to the present time.

In the Supreme Court of Pennsylvania this Plaintiff in Error invoked the provision of the Con-

stitution of Pennsylvania requiring that all taxation shall be uniform upon the same class of subjects. In an earlier decision (*Commonwealth vs. Alden Coal Company*, 251 Pa. 134), under a different Act, the Supreme Court had said that the differences between anthracite and bituminous coal there brought to the attention of the Court did not justify their separate classification for tax purposes. The failure to develop the facts in that case led to a decision clearly wrong. In the present case the differences hereinafter to be mentioned in detail, and which were brought upon the record, caused the Court to reach a different conclusion upon this question of classification as shown by the opinion of Mr. Justice Simpson. The fact that the former opinion of the Court was not followed shows how clearly the propriety of the classification was demonstrated here. The differences in the facts as adduced in the two cases are pointed out in some detail in the opinion of the Judges of the Trial Court in the Record at page 55 et seq.

It is at once apparent that the provision in the Constitution of Pennsylvania is a very strict one, but as it permits classification that question became the controlling one in this case, and we are sure its discussion in the opinion will be very helpful to this Court.

Referring to the argument that this tax violates the 14th Amendment, Justice Simpson says (Record p. 141):—

"It is finally contended that the statute does not give to appellant the 'equal protec-

tion of the laws' guaranteed to him by the 14th Amendment to the Constitution of the United States; a complete answer to which is the following quotation from *District of Columbia v. Brooke*, 214 U. S. 138, 150: 'We have repeatedly decided—so often that a citation of the cases is unnecessary, that it does not take from the states the power of classification, and also that such classification need not be either logically appropriate or scientifically accurate. The problems which are met in the government of human beings are different from those involved in the examination of the objects of the physical world, and assigning to them their proper associates. A wide range of discretion, therefore, is necessary in legislation to make it practical, and we have often said that the Courts cannot be made a refuge from ill-advised, unjust or oppressive laws.' "

In justifying the classification whereby anthracite is taxed and bituminous is left untaxed, we are not required to invoke the language above quoted from this Court, because the reasons for the separate classification of these two commodities are clear and logical. We shall briefly review some of the leading cases, but before doing so it may be well to point out the many distinctions between anthracite and bituminous coal, supported by the facts admitted in the record of this case. These are summarized in the opinion of the Supreme Court as follows (Record pp. 139-140):—

"Anthracite coal differs from bituminous coal in the following physical properties: the amount of fixed carbon, the amount of volatile matter, color, lustre and structural character. The percentage of fixed carbon in anthracite coal is much higher, and the percentage of volatile matter is much lower than in bituminous coal. Anthracite coal is hard, compact and comparatively clean and free from dust and is commonly termed 'hard coal' while bituminous coal is very much less hard, and is dusty and dirty and is commonly termed 'soft coal', (hence) bituminous coal burns with more or less smoke while anthracite coal burns with practically no smoke.

"The fuel ratio * * * of bituminous coal differs from that of anthracite coal; as the fuel ratio of bituminous coal rises the coal is more soft, as the fuel ratio of anthracite coal rises the coal is more hard.

"Sixty-one per cent. of anthracite coal produced in Pennsylvania is used for domestic purposes and substantially all anthracite coal is used for fuel in the production of heat for domestic purposes and of steam for domestic purposes and for power; but bituminous coal is used not only for fuel but as a raw material from which a great number and variety of commercial products are manufactured.

"A small percentage of anthracite produced in Pennsylvania is used in the production of gases known as water-gas and producer-gas. Said gases, which are also produced from coke, are of a different character from

that produced from bituminous coal, (the latter) known as coal gas, is produced from the volatile matter in said coal; (in addition) a large amount of bituminous coal produced in Pennsylvania is used in the production of gas for fuel and illumination in addition to the gas produced in connection with the manufacture of coke.

"Methods of eliminating impurities from bituminous coal are being developed, whereby the percentage of the Pennsylvania bituminous coal available for the manufacture of marketable coke is increasing. Recent experiments in by-product ovens indicate that practically all the bituminous coal in Pennsylvania will be available for the manufacture of marketable coke when the elimination of high sulphur and high phosphorus has been accomplished.

"The gas liberated in the manufacture of coke by the by-product process is saved and used for fuel and illumination and, with some resultant chemical changes and by distillation and condensation, volatile matter is recovered in the form of tar or pitch, ammonia (used largely in the manufacture of fertilizers), cyanide and benzol, and other oils used to generate power by internal combustion and for other purposes."

"Much of the tar and pitch so recovered is used in surfacing highways, but from a large part thereof there are extracted, by various processes, fourteen or more separate articles of commerce and hundreds of medicinal and

other products in common use, which, though it is possible to 'extract them from anthracite, cannot be produced therefrom in quantities rendering such production commercially practicable and none are in practice produced therefrom.'

"For more than sixty years congress has taxed anthracite and bituminous coal differently, as has the Canadian parliament for upwards of thirty-five years; and the general assembly of this State has repeatedly legislated for the two classes separately, as well regarding the regulation of mining as the weights at which the coals may be sold, (see Acts May 18th, 1878, P. L. 67; June 2nd, 1891, P. L. 176; June 26th, 1895, P. L. 334; June 9th, 1911, P. L. 756; May 27th, 1921, P. L. 1193); as a result of these and other factors relating to market value, 'the price of anthracite coal on cars at the mine is ordinarily much larger than the price of bituminous coal on cars at the mine, the difference resulting largely from differences in rates of royalty and cost of production and preparation for market.'"

Every one knows that anthracite, as a fuel, is to a great extent a luxury. It is clean, free from dust, free from smoke, does not require the constant attention of a bituminous fire and for domestic purposes, for which the greater portion of it is used, it commands a much higher price than bituminous coal.

When we tax anthracite coal we tax a commodity which is a fuel and nothing else. But what would be the result of a tax on bituminous? Here

enters an element of *public policy*, one of the soundest bases for the exercise of legislative discretion. If we were to tax bituminous we would be taxing not only a fuel, but also a raw material from which are manufactured the great variety of important products referred to in the Answer (Record pp. 18-20). We would be taxing ammonia, produced in great quantities from bituminous coal and becoming such an important factor in fertilizing the Soil. We would be taxing coal-oil, including benzol and other motor fuels for which there is a constantly growing demand. We would be taxing the pitch and tar of which our own State uses from 3,000,000 to 6,000,000 gallons annually on the State highways, without including what is used by county and other local authorities. We would be taxing the dye industry, the building up of which is now regarded as one of the most important factors in maintaining American industrial independence. We would be taxing high explosives, indigo, carbolic acid, paints, chlorides, saccharine, creosote, perfumery, sulphur compounds, medicines and other products almost innumerable. We would be taxing coke and through it the great metal industry which is the pride of Pennsylvania. We would also be taxing coal gas, produced in immense quantities from bituminous coal in Pennsylvania and now becoming more than ever important as the supply of natural gas approaches its inevitable end.

The industries producing most of these products are in their infancy. Quantities and values are given in the Answer (Record pp. 19-20), showing that in the manufacture of coke approximately

thirty-five per cent. of the coal used in the by-product process in the United States, and more than half that used in the beehive process, is produced in Pennsylvania; that in the year 1918 the total value of the tar, ammonia, gas, benzol products, naphthaline and other products made in the by-product coke industry in the United States was \$74,002,458; that the total production of coke in the United States was about 56,000,000 tons of a value, at the ovens, of \$382,000,000 and that of said total production of coke about forty-seven per cent. was produced in Pennsylvania.

Counsel for the Plaintiff in Error place much emphasis upon their assertion that the coal produced in Pennsylvania and used in the manufacture of by-products is a small percentage of the total bituminous production of the State. It seems appropriate, in this connection, to call attention (Record pp. 18-19) to the fact that practically all the bituminous coal produced in Pennsylvania is of the type from which coke can be made, that in the year 1918 (the last year as to which statistics were available) more than one-quarter of the bituminous coal produced in Pennsylvania was used in the manufacture of coke, and that while the larger portion was used in the beehive oven process, which does not save the by-products, yet the beehive process "is being rapidly replaced by the by-product process." Thus it is clearly to be inferred and is a matter of common knowledge that the by-product process soon will be the only process in which coke is made, because the by-products are becoming more and more valuable and important.

A publication reporting the hearings before the Finance Committee of the United States Senate on Tariff Bill, H. R. 7456, contains the following:

"A complete self-sustaining domestic dye and coal-tar chemical industry is indispensable to our national prosperity for five compelling reasons:

"(a) Three billion dollars' worth a year of American goods cannot be made without its products.

"(b) It alone can keep the nation abreast of the progress of science in chemical warfare, and provide and keep available in peace times, an inexhaustible source of explosives and poison gasses needed for national defense.

"(c) Without it no real disarmament is possible.

"(d) It alone can insure due progress in industrial chemistry.

"(e) It alone can provide both personnel and material needed for the advancement of scientific and medical chemistry."

The great importance of the coal-tar products, from the standpoint of public policy, appears very strikingly in the following editorial comment from the New York Sun of October 7th, 1921:—

"At a recent hearing by the Finance Committee of the Senate it was asserted by chemists that the burning of bituminous coal involved annually a loss of nearly 6,000,000 tons of ammonium sulphate that could be saved if the coal were first made into coke. This by-

product, they said, would fertilize 118,000,000 acres of land and in wheat crops add seven bushels per acre. Coal-tar products are also used in manufacturing. With vast natural resources Americans have in many instances inclined toward a careless use of them while countries less fortunate in possessions have excelled in economical methods. Such oversight is a species of industrial waste more costly than is generally realized."

The Commissioner of Patents of the United States has certified officially that during the last five years over four hundred patents have been granted by the United States Patent Office for coal-tar products.

And these are the industries the Plaintiff in Error says we must tax, because we are taxing that rare product, anthracite coal, a fuel only and the main use of which is as a domestic luxury.

The argument by Counsel for the Plaintiff in Error that the time may come when any of the products above referred to can be made from anthracite does not receive the slightest support from the facts. The utter fallacy of such an argument may be demonstrated very simply. These products (except coke which is the residue after they have been removed) are made from volatile matter in the bituminous coal, and the great distinction between bituminous and anthracite is that by an additional process of nature to which bituminous has not been subjected the volatile matter has been largely eliminated from the anthracite "as it is removed from the bituminous coal in the manu-

facture of coke." It is admitted, subdivision (3) of ninth paragraph of the Answer (Record p.18) that the difference between anthracite coal and coke "consists in the structure, that of coke being cellular, while the pressure to which anthracite has been subjected has rendered it a hard, compact substance" and further in subdivision (5) that "coke cannot be made from anthracite coal" (Record p. 19.) The reason is plain. In their composition, coke and anthracite coal are the same. It is clearly evident, then, that the *remnant* of volatile matter in anthracite coal is about the same as the remnant of volatile matter in coke, and that the extraction, from anthracite, of coal-tar and the other enumerated by-products is as remote as the extraction of gold from sea-water.

Even if the two commodities were more closely related in their origin, it would be of little consequence for the purposes of the present case. Cement and lime are very closely related in their origin, yet they are distinct and separate commodities. The same may be said of molasses and sugar. Sandstone, slate, granite and marble all have a common or closely related origin, yet they are recognized as entirely different commodities.

The main theory of the Plaintiff in Error seems to be that the differences between anthracite and bituminous coal are differences of degree and not of kind. We submit that the array of facts in this case negative any such theory. But even if this were not so, the obvious answer is that a sufficient difference of degree produces a difference of kind. Ice, water and steam are identical in their composition. They differ only in the degree of heat to

which each one has been subjected. Nevertheless, they are separate and distinct commodities and marketed as such. The difference in degree produces a difference in kind.

Both water and ice may be taken from the same river and marketed. Clearly either could be taxed without reference to the other—yet in their composition they are exactly the same thing. Their origin is the same and they have been subjected to the same processes of nature, except that ice (like anthracite) has been subjected to an additional process which renders it a different commodity.

Very much is attempted to be made of the alleged similarity of use and of the fact that there is competition in the market between bituminous coal and that percentage of the anthracite product which is too fine for domestic use.

Anthracite is used for fuel, practically all of it. This is also *one of the purposes* for which bituminous is used. Manifestly this cannot prevent their separate classification any more than the separate classification of sugar and saccharine (a coal-tar product) would be prevented. So with the argument that forty per cent. of the anthracite comes into direct competition with bituminous. This, of course, is the "steam sizes"—the small sizes which are a kind of by-product of the preparation of the domestic sizes. Being used to produce steam, of course they are used for *one of the purposes* for which bituminous is used. But how can this fact affect the question of classification? Surely the mere fact of competition between two commodities is not an obstacle to their separate

classification for tax purposes. If the taxing of anthracite required also the taxing of bituminous, because there is some competition between them for fuel purposes, then we could not stop with bituminous. It is a matter of common observation and knowledge that large quantities of cord wood are used in Pennsylvania for fuel, every cord of which limits to that extent the use of coal. We were informed by the Pennsylvania Department of Forestry, and the fact was used in our arguments in this case in the Pennsylvania Courts, that the annual use of cord wood for fuel in Pennsylvania is nearly 12,000,000 cords, of a value of about \$40,000,000. So, there being very substantial competition between cord wood and bituminous coal, the theory of the Plaintiff in Error would require that if the tax be extended to bituminous it be extended likewise to cord wood. So as to natural gas. For years there has been very direct competition in Western Pennsylvania between bituminous coal and natural gas. By the same theory, then, the tax would have to be extended on to natural gas. Even then the end would not be reached, because fuel oil (a grade of petroleum) is now a very active competitor of bituminous coal.

Manifestly it will not do to say that we cannot levy a tax on a commodity as distinctive and well recognized as anthracite coal without extending it, on the theory of competition, to bituminous coal and to cord wood and to natural gas and to fuel oil. A very little thought will suggest numerous subjects as, for example, butter and oleomargarine, the separate classification of which

would not be questioned for a moment, but which are brought into competition with each other to a very large extent.

The following quotations from the opinion of Mr. Justice Simpson in the present case are very appropriate here (Record pp. 137-138):—

“Moreover, the contention upon this point, practically considered, asks us to reverse the legislature on a disputable question of fact, viz: Have the new uses to which bituminous coal may now be put, carried it into a separately taxable class? When anthracite coal was first ascertained to be available for domestic and manufacturing purposes, it found wood in practical possession of the field. For some time the former entered but slightly in competition with the latter; now, in this State at least, the former (latter?) is but little used for those purposes. When, then, under this contention, did the competition become sufficiently great to allow classification as between wood and coal used for domestic purposes?, and what tribunal was to decide this, the legislature or the Courts? Admittedly bituminous coal is used in the manufacture of coke, and anthracite coal, practically considered, cannot be; and admittedly also the smaller sizes of anthracite coal come in competition with bituminous coal in the manufacture of steam for industrial uses, and to a minor degree for heating purposes. Can the courts rightfully say that the time has not yet come when, despite the former and because of the latter, the legislature may not classify

under the general power given to it?, or can they rightfully say to it, you may not exercise the power to classify until a greater percentage of bituminous coal is used in the manufacture of coke than the percentage of anthracite coal used in the manufacture of steam? and if they may do this, where must they draw the line in order not to encroach on legislative power?

* * * * *

"If we permitted ourselves to declare that the legislature could only form classes for the purposes of taxation, by putting into each class all things which in their use were not substantially competitive, we would not only seriously impair its constitutional right to classify, but would probably also eliminate many of the objects of taxation. For instance, would the fact of their general use for clothing, prevent silk and velvet being taxed without adding also cotton goods and gingham, or broadcloth without also taxing palm beach suitings? If they did the silk, velvet and broadcloth would doubtless escape because of serious objections against taxing the cheaper materials. Illustrations such as the foregoing could probably be indefinitely multiplied, bricks and stones used for building, slate and shingles used for roofing, mahogany and pine used for furniture, plated ware and solid silver used on the table, etc., etc.

"In the light of these considerations we can only hold, as already stated, that, so far as concerns the classes into which articles may

be arranged for purposes of taxation, the matter is one for the legislature and not for the courts; and the latter not only have no duty to classify but they are and should be forbidden to interfere with the legislative classification unless they can say with certainty that it is purely illusory, clearly intended as an evasion of the constitution. It is not so in the present case; on the contrary we have findings of undisputed facts, showing a wide difference in the character of these coals and the uses to which they are put; that the people, through the separate branches of their government, state and national, have long treated them as different articles, to be separately classified, needing the protection of government in different ways and to different degrees; and hence the legislature has the power to classify them for the purpose of taxation, to the appropriate end that where governmental care is most required the burdens of government shall bear heaviest."

The anthracite and bituminous industries are so different that they require entirely different mining codes for their regulation and the protection of those engaged therein, as referred to in the Answer (Record p. 21) and in the opinion of Mr. Justice Simpson (Record p. 140). We apprehend that Counsel for the Plaintiff in Error will not question the statement that the Commonwealth employs twenty-five inspectors to enforce the safety regulations in the five hundred anthracite mines in the State and only thirty inspectors to perform

the same function in the twenty-five hundred bituminous mines.

Another case now before this Court (*Mahon vs. Pennsylvania Coal Company*), involving an effort by the Commonwealth to deal with the anthracite mine cave situation, shows one of the distinct problems which this industry brings to the public. The question thus dealt with has been a burning one for years. Nobody ever heard of any such problem growing out of the bituminous industry. Apart from any question of the merit of the treatment of this problem by the Mine Cave Act of 1921, the passage of that Act shows a matter of very great public concern growing out of the anthracite industry and not appearing to affect the bituminous.

In view of all the foregoing, how can it be argued, under the decisions of this Court, that there is any doubt of the validity of this classification?

"Nothing in the 14th Amendment imposes any ironclad rule upon the States with respect to their internal taxation, or prevents them from imposing double taxation, or any other form of unequal taxation, so long as the inequality is not based upon arbitrary distinctions:

Mr. Justice Pitney in *St. Louis S. W. R. Co. v. Arkansas*, 235 U. S. 350, 59 L. Ed. 265 (1914), citing numerous cases.

"Suppose, for any fair reason affecting only its internal affairs, the state should see fit to wholly exempt certain named corporations from all taxation. Of course the indirect result would be that all other property might

have to pay a little larger rate per cent. in order to raise the revenue necessary for the carrying on of the State government, but this would not invalidate the tax on other property, or give any right to challenge the law as obnoxious to the provisions of the Federal Constitution.

“*** Indeed, this whole argument of a right under the Federal Constitution to challenge a law on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision in *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 237, in which case Mr. Justice Bradley, speaking for the Court, said:

“The provision in the 14th Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them *** We think that we are safe in saying that the 14th Amendment was not intended to compel

the states to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the states, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material, but it would render nugatory those discriminations which the best interests of society require; *which are necessary for the encouragement of needed and useful industries*, and the discouragement of intemperance and vice; and which every state, in one form or another, deems it expedient to adopt."

Mr. Justice Brewer, in *Merchants and Manufacturers Bank vs. Pennsylvania*, 167 U. S. 461, 42 L. Ed. 236.

(Italics are ours).

"And so Mr. Justice Miller, speaking for the Court in *Davidson v. New Orleans*, 96 U. S. 97, said: "The Federal Constitution imposes no restraints on the state in regard to unequal taxation'.

"The court, through Mr. Justice Lamar, in *Pacific Express Co. vs. Seibert*, 142 U. S. 339, was equally emphatic. He said on page 351: "This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property *selected either for bearing its burdens or for being exempt from them*, is

not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principles of uniformity and equality of taxation and of just adaptation of property to its burdens'. And it was said in *Merchants' & Mfrs. Nat. Bank v. Pennsylvania*, 167 U. S. 461: 'Indeed, this whole argument of a right under the Federal Constitution to challenge a tax law on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision in *Bell's Gap R'd Co. v. Pennsylvania*'.

"* * * Nor do the exemptions of the statute render its operation unequal within the meaning of the 14th Amendment. 'The right to make exemptions is involved in the right to select the subjects of taxation and apportion the public burdens among them, and must consequently be understood to exist in the law-making power wherever it has not in terms been taken away. To some extent it must exist always; for the selection of subjects of taxation is of itself an exemption of what is not selected.'"

Mr. Justice McKenna, in *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 42 L. Ed. 1037.

The case of *Crescent Cotton Oil Co. vs. Mississippi*, 66 L. Ed. 55 (Advance Sheets) decided No-

vember 14th, 1921, involved a discrimination between corporations and individuals in the exercise of the police power by the State. Sustaining the State law, Mr. Justice Clarke said:—

“It is clearly settled that any classification adopted by the State in the exercise of this power which has a reasonable basis, and is therefore not arbitrary, will be sustained against an attack based upon the equal protection of the laws clause of the 14th Amendment, and also that every state of facts sufficient to sustain such classification which can reasonably be conceived of as having existed when the law was enacted will be assumed.”

In *Dane vs. Jackson*, 256 U. S. 589, involving a Massachusetts income tax law, this Court said:—

“Where, as here, conflict with Federal power is not involved, a state tax law will be held to conflict with the 14th Amendment only where it proposes, or clearly results in, such flagrant or palpable inequality between the burden imposed and the benefit received as to amount to the arbitrary taking of property without compensation—to spoliation under the guise of exerting the power of taxing.”

In *Watson vs. State Comptroller*, 254 U. S. 122, involving an alleged discrimination against certain bonds by a New York tax law, this Court said:

“Any classification is permissible which has a reasonable relation to some permitted end of governmental action. It is not necessary,

as plaintiff in error seems to contend, that the basis of the classification must be deducible from the nature of the things classified—here the right to receive property by devolution. It is enough, for instance, if the classification is reasonably founded in 'the purposes and policy of taxation.' ”

That oleomargarine and butter, which are substantially the same thing, used for all the same purposes and in constant and direct competition with each other, may be separately taxed, and that oleomargarine may be taxed and butter left untaxed, has been held repeatedly :

McCray vs. United States, 195 U. S. 27; *Hammond Packing Co. vs. Montana*, 233 U. S. 331.

In *Northwestern Mutual Life Insurance Co. vs. Wisconsin*, 247 U. S. 132, different rates of tax were charged different kinds of life insurance companies, and fraternal beneficial societies were wholly exempt. This Court said :—

“This brings us to the question whether the statute denies to the company the equal protection of the laws. That the State is not, because of the 14th Amendment, required to tax all property alike and may classify the subject selected for taxation, is too well established to require citation of the many cases in this Court which have so held. The classification must not be arbitrary and must rest upon real differences. Subject to these qualifications the state has wide discretion.”

In *Barret vs. Indiana*, 229 U. S. 26 (57 L. Ed. 1050), a statute of Indiana required a certain width of the entries in bituminous coal mines without any similar requirement in block coal mines. It was claimed that this was a discrimination against the bituminous industry. Mr. Justice Day, speaking for this Court, said:—

“The equal protection of the laws requires laws of like application to all similarly situated; but in selecting some classes and leaving out others the legislature, while it keeps within this principle, is, and may be, allowed wide discretion. It is the province of the legislature to make the laws, and of the courts to enforce them. * * * The legislature is permitted to make a reasonable classification, and before a court can interfere with the exercise of its judgment, it must be able to say ‘that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.’”

In *Southwestern Oil Co. vs. Texas*, 217 U. S. 114, 54 L. Ed. 688, the State had imposed a tax on all wholesale dealers in oils without exacting a similar tax from such dealers in other articles. Mr. Justice Harlan, speaking for the Court, reviewed a number of the leading cases and said:—

“The state had the right to classify such dealers separately from those who sold, by wholesale, other articles than those mentioned in that section. The statute puts the constituents of each of those separate classes on the same plane of equality. It is not arbi-

trary legislation, except in the sense that all legislation is arbitrary. If it be within the power of the legislature to enact the statute, then arbitrariness cannot be predicated of it in a court of law. And it cannot be held to be beyond legislative power simply because of its classification of occupations. What were the special reasons or motives inducing the state to adopt the classification of which the Oil Company complains, we do not certainly know. Nor is it important that we should certainly know. It may be that the main purpose of the state was to encourage retail dealing in the particular articles mentioned in paragraph nine. If the statute had its origin in such a view, we do not perceive that this Court can deny the power of the state to proceed on that ground. We may repeat what was said in *Delaware Railroad Tax*, 18 Wall. 206, 231, 21 L. Ed. 888, 896, that 'it is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the state; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction'. But we will not speculate as to the motives of the state, and will assume the statute, neither upon its face nor by its necessary operation, not suggesting a contrary assumption—that the state has in good faith sought, by its legislation, to protect or promote the interests of its people. It is sufficient for the disposition of this case to say that, except as restrained by

its own Constitution or by the Constitution of the United States, the state of Texas, by its legislature, has full power to prescribe any system of taxation which, in its judgment, is best or necessary, for its people and government; that, so far as the power of the United States is concerned, the state has the right, by any rule it deems proper, to classify persons or businesses for the purposes of taxation, subject to the condition that such classification shall not be in violation of the Constitution of the United States; that the requirement by the state, that *all* wholesale dealers in *specified articles* shall pay a tax of a given amount on their occupation, without exacting a similar tax on the occupations of wholesale dealers in other articles, cannot, on the face of the statute or by reason of any facts within the judicial knowledge of the court, be held, within the meaning of the 14th Amendment, to deprive the taxpayer of his property without due process of law, or to deny him the equal protection of the laws; and that the Federal Court cannot interfere with the enforcement of the statute simply because it may disapprove its terms, or question the wisdom of its enactment, or because it cannot be sure as to the precise reasons inducing the state to enact it."

It would not be argued that the 14th Amendment would prevent a State from assessing an income tax at one rate against the citizen with a large income, at lower rates against citizens with smaller incomes and exempting those with incomes of less

than a specified sum. This would not deprive any one of the "equal protection of the laws".

To-day, if ever, it is important to concede to the State "full power to prescribe any system of taxation which, in its judgment, is best or necessary for its people and government" and "the right, by any rule it deems proper, to classify persons or businesses for the purposes of taxation". The demands upon the State governments were never so great, for roads, for schools, for the help of the unfortunate and other claims not to be denied, while the invasion by the Federal Government of fields of taxation naturally belonging to the States makes it hard for them to know where to turn for the revenues essential to them.

As said in the case last cited, this Court will not "interfere with the enforcement of the statute simply because it may disapprove its terms, or question the wisdom of its enactment, or because it cannot be sure as to the precise reasons inducing the State to enact it". How, then, can interference be suggested when the statute involves a classification as clearly and fully sustained by the facts as the statute now before the Court. Some forms of property must be taxed if this great Commonwealth is to perform its functions. What property is suggested in preference to this great natural product, the rapid consumption of which is fast reducing the mineral wealth of the State?

II

A TAX LEVIED ON ANTHRACITE COAL WHEN IT HAS BEEN MINED AND PREPARED FOR MARKET AND PRIOR TO ITS BEING SHIPPED OR COMMITTED TO A CARRIER FOR SHIPMENT HAS NOTHING TO DO WITH INTERSTATE COMMERCE.

(See note at end of this Section, page 36)

If anything is settled it is the rule that property is subject to the taxing power, as well as the police power, of the States, up to the moment it actually enters the stream of interstate commerce and that this does not occur until it has been shipped or committed to a carrier for shipment. The tax in this case is levied before the coal has been shipped or committed to a carrier for shipment. It attaches as soon as the mining, washing and preparation for market have been completed—when it is *ready for market or shipment*.

To suggest that this is a tax on interstate commerce is to disregard a long, unbroken line of decisions of this Court.

A very familiar decision is that in *Coe vs. Errol*, 116 U. S. 517. Logs cut in New Hampshire were brought down the river to Errol, N. H., where they were held awaiting a convenient opportunity for transportation by the river to Portland, Maine. While at Errol they were taxed. Sustaining the tax, this Court said:—

“Some of the Western States produce very little except wheat and corn, most of which is intended for export; and so of cotton in the Southern States. Certainly, as long as these

products are on the lands which produced them, they are part of the general property of the state. * * * The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence, is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation."

This decision was followed in the similar case of *Diamond Match Co. vs. Ontonagon*, 188 U. S. 82, 47 L. Ed. 394.

At the moment when the operations of mining, washing and preparation for market have been completed—the time when the tax attaches—it cannot be told, as to any particular ton of coal, whether it is destined for shipment out of the State or not. It cannot even be said that any intention exists as to its destination. It may be piled in storage for months before any one knows where it is going. Even if, at the time it is taxed, an intention has been formed to ship it out of the State, it will not matter.

In *Turpin vs. Burgess*, 117 U. S. 504, an Act of Congress laid a tax on manufactured tobacco, to be paid by affixing stamps before removal from the factory. *Specific packages were intended for export* at the time the stamps were attached, because the rate on that intended for export was 25 cents while on all other it was 32 cents. It was held not to be a "duty on exports" forbidden by the Constitution of the United States. This Court said:—

"We have lately decided, in *Coe vs. Errol*, 116 U. S. 517, that goods intended for exporta-

tion to another State are liable to taxation as part of the general mass of property of the state of origin until actually started in course of transportation to the State of their destination, or delivered to a common carrier for that purpose, provided they are taxed in the usual way in which such property is taxed, and not taxed by reason of or because of such exportation, or intended exportation, and that the carrying of them to and depositing them at a depot for the purpose of transportation is no part of that transportation. Now the constitutional provision against taxing exports is substantially the same when directed to the United States as when directed to a State. *

* * *

"It is true it was conceded in *Coe vs. Errol* that the prohibition to the States against laying duties on imports or exports related to imports from and exports to foreign countries; yet the decision in that case was based on the postulate that when such imposts or duties are laid on imports or exports from one State to another it amounts to a regulation of commerce among the States, and, therefore, is an invasion of the exclusive power of Congress. So that the analogy between the two cases holds good, and what would be constitutional or unconstitutional in the one case would be constitutional or unconstitutional in another.

"In the present case, the tax (if it was a tax) was laid upon the goods before they left the factory. They were not in the course of exportation; they might never be exported;

whether they would or not would depend altogether upon the will of the manufacturer."

In *Connell vs. Coyne*, 192 U. S. 418, an Act of Congress taxed "all filled cheese which shall be manufactured" and it was held that filled cheese made expressly for export was not protected by the constitutional provision forbidding a duty on exports.

In the very recent case of *United Mine Workers vs. Coronado Coal Co.*, (*Advance Sheets*) 66 L. Ed. 643, 657, the Chief Justice said:—

"Coal mining is not interstate commerce, and the power of Congress does not extend to its regulation as such. In *Hammer vs. Dagenhart*, 247 U. S. 251, 272, * * * we said: 'The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterward shipped or used in interstate commerce make their production a part thereof.'"

In *Susquehanna Coal Co. vs. South Amboy*, 228 U. S. 665, coal mined in Pennsylvania by the plaintiff was shipped to its own order at South Amboy, N. J., a tidewater port. It was there dumped into a coal depot to be later transferred to bottoms. It was held to be subject to local taxation while in that depot or storage-yard, although destined ultimately for ports in other States.

A striking case is *Bacon vs. Illinois*, 227 U. S. 504. Grain was shipped from Southern and Western States under contracts for its transportation to New York, Philadelphia and other eastern cit-

ies, reserving to the owner the right to remove it from the cars at Chicago for the purposes of inspection or changing consignee. While in transit, Bacon purchased the grain. He removed it at Chicago to his private elevator for the *sole* purpose of inspection and promptly returned it to the railroad under the original contracts of transportation. It was held that Illinois had the power to tax the grain while in his elevator. This Court said:—

“It was not being actually transported, and it was not held by carriers for transportation. * * * The purpose of the withdrawal does not alter the fact that it had ceased to be transported and had been placed in his hands.”

In *General Oil Co. vs. Rain*, 209 U. S. 211, oil shipped from Pennsylvania and Ohio was held at a distributing point in Tennessee, at which point it was unloaded from the tank cars into tanks, barrels, etc. and there forwarded to Arkansas, Louisiana and Mississippi. It was held not to be property in interstate commerce so as to be exempt from tax in Tennessee. This Court said:—

“The Company was doing business in the State, and its property was receiving the protection of the State. Its oil was not in movement through the State.”

In view of the foregoing and many other decisions and the rule so clearly and positively laid down, it is surprising to find the Plaintiff in Error

asserting that this Court intended to suggest any other rule in the recent decisions in *Eureka Pipe Line Co. vs. Hallanan*, 66 L. Ed. 127, and *United Fuel Gas Co. vs. Hallanan*, 66 L. Ed. 130, both decided December 12th, 1921.

These cases do not indicate the slightest deviation from the rule laid down in the other cases to which we have referred. The only difference is that their facts place them on the other side of the line, and that in them we are dealing with property which had entered the stream of interstate commerce.

In the *Eureka Pipe Line* case West Virginia undertook to impose a per barrel tax on the transportation of oil in pipe-lines. The plaintiff owns a system of pipe-lines connecting with other States, and oil flows in the pipes in a continuous stream outside the State. The West Virginia producer delivers oil to the pipe-line where it is mixed in the moving stream, and receives in exchange a credit on the books which represents the right to withdraw a proportionate part of the stream for intrastate sale or to order delivery outside of the State, at his option. This Court held that this was a tax on interstate commerce, saying:—

“It appears to us as a practical matter that the transmission of this stream of oil was interstate commerce from the beginning of the flow.”

This seems to harmonize exactly with the former decisions which hold that the property is in the stream of commerce from the time it starts on its

journey or has been committed to a common carrier for that purpose.

The United Fuel Gas Co. case is like the Eureka Pipe Line case, except that the United Fuel Gas Co. was a carrier of natural gas. This Court said:—

“There is no break, no period of deliberation, but a steady flow, ending, as contemplated from the beginning, beyond the State line.”

That in deciding these cases last mentioned the Court had no thought of deviation from the rule so well established is still further shown by its very distinct reiteration in *Crescent Cotton Oil Co. vs. Mississippi*, 66 L. Ed. 55, decided November 14, 1921. In that case the Court cited *Coe vs. Errol* and other earlier cases and said:—

“And the fact, of itself, that an article when in the process of manufacture is intended for export to another state does not render it an article of interstate commerce. * * * When the ginning is completed, the operator of the gin is free to purchase the seed or not; and, if it is purchased, to store it in Mississippi indefinitely, or to sell or use it in that State, or to ship it out of the State for use in another; and, under the cases cited, it is only in this last case, and after the seed has been committed to a carrier for interstate transport, that it passes from the regulatory power of the State into interstate commerce and under the National power.”

Surely it is needless to multiply citations or to say anything more on this branch of the case.

NOTE.—Though expressly raised in the Petition for Writ of Error (Record p. 145) and in the Assignments of Error (Record p. 151) the complaints based upon the commerce clause of the Constitution and the prohibition of taxation on exports are abandoned in the book which we have now received from Mr. Louis Marshall, of Counsel for the Plaintiff in Error. As we already had the foregoing discussion in type and we do not know what may be argued by other Counsel who, we are informed, contemplate participation as friends of the Court, we allow this part of our argument to stand.

III.

COMMENTS ON ARGUMENT OF PLAINTIFF IN ERROR.

Having received a book from Mr. Marshall, we hastily add a few comments thereon before having our book finally printed.

(1)

Said Counsel now appearing for the Plaintiff in Error has inadvertently made a somewhat misleading statement on page seven of his book. He says:—

“The complainant further alleges in paragraph 8 (Rec. p. 9), and the allegation is not denied in the answer:—

“The commodity known as coal is a fuel and is found in various grades or qualities in Pennsylvania, the grades being known as anthracite, bituminous, semi-anthracite and semi-bituminous.”

As the case was heard on Bill and Answer every averment of the Answer is taken as true, and the answer to the paragraph just quoted was as follows (Record p. 16):—

“Eighth. We do not admit the conclusion averred in the Bill, that anthracite and bituminous coal are merely different grades or qualities of coal, but submit to the Court that they are distinctly different commodities under the basic facts hereinafter averred. The

coal sometimes known as semi-bituminous is a grade of bituminous coal higher in its percentage of fixed carbon and lower in its percentage of volatile matter than is ordinarily the case in bituminous coal, and the coal sometimes known as semi-anthracite is a low grade of anthracite coal containing some volatile matter and a lower percentage of fixed carbon than is ordinarily the case with anthracite coal. The quantities of said coals referred to as semi-anthracite or semi-bituminous produced in Pennsylvania are very small as compared with the total of anthracite and the total of bituminous, respectively, as produced in the State, it appearing by the plaintiff's Bill that the total quantity of anthracite is about one hundred and sixty-three times the quantity of semi-anthracite."

Therefore, it being established that "semi-anthracite" is merely a grade of anthracite, and that "semi-bituminous" is merely a grade of bituminous, we have dealt in our argument with anthracite and bituminous as the two kinds of coal with which we are concerned.

(2)

We do not know where Counsel find authority for the statement on page eighteen of his book that "bituminous coal is soft, the softening developing only in the course of combustion and being a valuable quality". Everybody knows that bituminous coal when mined is very soft as compared with anthracite, and that it so disintegrates when

exposed to the air that long shipment tends to turn lump coal into much finer coal.

(3)

Much space is given to the opinion of Mr. Justice Stewart in *Commonwealth vs. Alden Coal Company*, 251 Pa. 134, quoted on pages 22-27 of the book of Plaintiff in Error. It is understood, of course, that the conclusion reached in that case on the question of classification has been superseded, so far as the present case is concerned, by the decision herein. It is relevant here only as Counsel may care to adopt its reasoning. As so much emphasis has been placed upon the opinion, it may be well to state with some detail just what was before the Supreme Court of Pennsylvania in that case, and how it differs from the case here.

The Act of 1913, which was before the Supreme Court of Pennsylvania in the Alden case, was attacked on two grounds: first, on the question of classification, and second, because it distributed the proceeds of the tax in a way which was a violation of the Constitution of Pennsylvania. The Act was held unconstitutional, three of the seven Justices joining in a dissent. The opinion of Mr. Justice Stewart sustained both objections to the Act, being very emphatic on the second objection based on the distribution of the tax. His discussion of the question of classification is the only part of interest here, and it is quite apparent that it was based on an assumed state of facts wholly inadequate and erroneous. Instead of considering the question on the broad and well known distinctions between anthracite coal and bitumin-

ous, he stands upon certain Findings of Fact by the Judge in the lower Court, and one single reason advanced in argument on behalf of the Commonwealth, which he recites. He says:—

“A single difference as a basis of classification is suggested in the brief of argument on behalf of the appellee: ‘The court, of its own knowledge, knows that the price of anthracite coal ranges from \$4 to \$8 per ton, and the price of bituminous coal ranges from \$1 to \$2 per ton.’

“ * * * It involves the proposition that it is competent for the legislature, by process of classification on the basis of market value, to throw the entire burden of the tax upon a selected few of an entire class, *undistinguishable in its members in any other regard*. And yet on this very crux of the case we have but this one suggestion of difference as a basis for classification, namely, market price or value.
* * *

“And so we recur to the main and only inquiry: What difference is there between anthracite and bituminous coal that makes the one, when prepared for market, a proper subject for taxation, and not the other? Our answer must be, after the most careful consideration of the question, *in the light of the findings of the learned judge who heard the case in the court below*, and the arguments advanced on the part of the commonwealth, that we discover none.”

(Italics are ours)

Now let us see what were the "findings of the learned judge who heard the case in the court below".

In the Alden case and its companion (*Commonwealth vs. St. Clair Coal Company*, 251 Pa. 159) the propriety of separate classification of anthracite and bituminous coal was considered so obvious by Counsel that no testimony relating thereto was introduced on the part of the Commonwealth, and the very brief testimony introduced on the part of the defendants was not rebutted. From said testimony the trial Court in the Alden case made certain Findings of Fact, from which we quote as follows:—

"8. Anthracite coal, bituminous coal, semi-bituminous coal and semi-anthracite coal are all found in large quantities within the State of Pennsylvania.

"9. Anthracite coal differs from bituminous, semi-bituminous and semi-anthracite coal only in general appearance and in the percentage of fixed carbon and volatile matter contained therein. The line of demarcation between the said different grades of coal is frequently so uncertain and indistinct as to make it difficult to determine to which grade certain coal belongs.

"10. * * * The uses to which anthracite coal and other kinds of coal are put are similar and in many instances identical.

"12. Anthracite coal is used for the same purposes as bituminous, semi-bituminous and semi-anthracite coal,—all of the said four grades being used in furnaces, in kitchens and in locomotives."

In the St. Clair case, the findings of which are used in common with those in the Alden case in the opinion of Justice Stewart, are the following findings:—

“6. The commodity known as coal is a fuel and is found in various grades or qualities in Pennsylvania, the more commonly known grades being known as anthracite and bituminous, but there being also grades known as semi-anthracite and semi-bituminous.

“7. The difference between anthracite, semi-anthracite, bituminous and semi-bituminous coal is one of degree and not of kind; it is a matter of difference in fixed carbon, volatile matter and dullness and brightness in appearance. There is as much difference between certain grades of anthracite as between some grades of anthracite and some grades of coal not called anthracite.”

It was upon these findings that Mr. Justice Stewart reached his conclusions “in the light of the facts found by the Court below”. In presenting the present case to the Pennsylvania Courts we pointed out that the Findings of Fact upon which the Alden and St. Clair decisions were based were absolutely inadequate and in some respects contradictory of the real facts. We have already pointed out the averments in the eighth paragraph of the Answer in the present case that semi-anthracite is but a grade of anthracite and semi-bituminous a grade of bituminous, so that but two kinds of coal are involved in our discussion.

The ninth finding in the Alden case, as above quoted, states that—"anthracite coal differs from bituminous, semi-bituminous and semi-anthracite coal only in general appearance and in the percentage of fixed carbon and volatile matter contained therein". In the present case it is conceded to be true (Paragraph Ninth of Answer, Record p. 17) that—

"The physical differences which distinguish anthracite and bituminous coal are differences in fixed carbon, volatile matter, color and dullness and brightness in appearance, and also in their structural character, anthracite being compact and hard and comparatively clean and free from dust and commonly termed 'hard coal', while bituminous is very much less hard, is dusty and dirty and is commonly termed 'soft coal'. 'That they are also distinguished by the fact that as the fuel ratio of bituminous rises the coal is more soft and as the fuel ratio of anthracite rises the coal is harder.' Also that 'except as to structure, the general difference between bituminous and anthracite is the same as that between bituminous and coke', it being the commonly accepted theory that, in their creation by the processes of nature, anthracite 'has been subjected to a process which has not been applied to bituminous, whereby, through the application of heat, a large portion of the volatile matter has been removed, as it is removed from bituminous coal in the manufacture of coke'; and that 'bituminous coal burns with more or less smoke—most of it with a dense

smoke—by reason of which some municipalities impose regulations requiring special appliances to abate the 'smoke nuisance', while anthracite burns with a practically smokeless flame."

The tenth and twelfth findings quoted above from the Alden case state that—

"The uses to which anthracite coal and other kinds of coal are put are similar and in many instances identical" and that "anthracite coal is used for the same purposes as bituminous, semi-bituminous and semi-anthracite coal—all of the said four grades being used in furnaces, in kitchens and in locomotives."

It is admitted in the present case (Ninth Paragraph of the Answer, Record p. 17) that—

"Substantially all the anthracite is used for fuel only, while bituminous and its products are used for a great number of other purposes."

The great and important uses of bituminous with which anthracite has not the most remote connection are mentioned in subdivision (5) of the ninth paragraph of the Answer (Record p. 19), from which we quote as follows:

"The gas liberated is saved and used for fuel and illumination and, with some resultant chemical changes and by distillation and condensation, volatile matter is recovered in the form of tar or pitch, ammonia (used

largely in the manufacture of fertilizers), cyanide and benzol and other oils used to generate power by internal combustion and for other purposes. Much of the tar or pitch so recovered is used, among other purposes, in materials for the surfacing of highways, the State Highway Department of Pennsylvania using annually from 3,000,000 to 6,000,000 gallons of such tar or pitch for such purposes. From said tar or pitch there are extracted by various processes certain products which, though it is possible to extract them from anthracite, cannot be produced therefrom in quantities rendering such production commercially practicable and none of which are in practice produced therefrom. Said products include:

- Saccharine, a substitute for sugar;
- Lampblack;
- Dyes;
- Sulphur Compounds;
- Indigo;
- Carbolic Acid and other antiseptics and germicides;
- Explosives, including picric acid, 'T. N. T.', etc.;
- Flavoring materials;
- Hydroquinine, for photographic development;
- Paints;
- Cleansing compounds and paint removers;
- Chloride;
- Creosote;
- Perfumery;

And hundreds of medicinal and other products in common use."

All these and other distinctions pointed out in Section I of this argument and numerous matters of common knowledge present a very different case from that which Justice Stewart discussed in the light of the findings of the Court below and the single argument of difference in market value.

(4)

In the numerous cases cited by Counsel for the Plaintiff in Error on pages 29-30 of his book we do not find one presenting a situation which seems to us to resemble the present case in any way: Discriminating between two railroad corporations doing exactly the same business in the State (Southern Ry. Co. vs. Greene); taxing one domestic corporation on its business done outside the State and exempting another from tax on its business done outside the State (Royster Guano Co. vs. Virginia); placing the same tax on a \$100 share of stock as on a \$1.00 share (People ex rel. Farrington vs. Menschina); making it unlawful for any one to engage in the business of insurance broker in connection with any other business except that of real estate agents or brokers (Hauser vs. North British & Mercantile Ins. Co.), or a statute restricting the right of employers to discharged employees who are members of labor organizations (State vs. Julow), being the cases to which Counsel for the Plaintiff in Error calls particular attention, all represent situations so entirely lacking in any resemblance to the case at

Bar as to greatly emphasize the absence of authorities supporting his position.

(5)

The frequent references to the similarity of anthracite coal and coke indicate a very different view from that which we have entertained. Counsel says (page 39) that—

“The most valuable substance recovered from the coal subjected to by-product processes consists of coke, which is, in all essential respects, anthracite coal,”

and again on page 38:—

“The admission that coke is anthracite coal in its essential respects, which is entirely true, merely emphasizes the contention that there is, for all practical purposes, identity between anthracite and bituminous coal. Not only can they be used interchangeably, as already indicated, but so much of the bituminous coal as is converted into coke by the application of heat becomes the natural equivalent of anthracite.”

Thus the fact that anthracite and coke, in their composition, are the same, is used as an argument against the taxation of anthracite and the exemption of coke or that from which coke is made. This seems to us entirely illogical. The failure to tax coke would be an extremely remote reason for objecting to the taxation of anthracite, because one is a natural product and the other a manufactured commodity, and the fact that bituminous,

when manufactured into coke, "becomes the natural equivalent of anthracite" demonstrates that there must be a very clear distinction between anthracite and bituminous, because it requires an important process of manufacture to produce from the latter the equivalent of the former.

The suggestion of Counsel that the uses for anthracite and coke are the same is entirely at variance with what we all know. Both are used for fuel, but we know that fuel is used for a great variety of purposes, and it is a very small amount of coke which is used for any purpose for which anthracite can be used. Sixty-one per cent. of anthracite is used for domestic fuel and the smaller sizes are used for heating furnaces, under boilers and in similar ways, but the great uses of coke in blast furnaces and the many other processes of the great iron and steel industries are wholly unknown to anthracite coal, because while the composition is the same, the structure of anthracite prevents its use in any of these numerous and important uses of coke.

(6)

We are at a loss to know what line of thought brings Counsel to the statement (page 40) that—

"In the case at bar there is not only absolutely identity of use, but practical identity in the origin, structure, method of production and physical characteristics of anthracite and bituminous coal."

Not only is it clear from the facts stated and found here on the record, but it is a matter of com-

mon knowledge that the uses of anthracite and bituminous are very far from identical. Entirely outside of the great amount manufactured into coke, bituminous is preeminently the fuel of industry, used in many of the processes for the manufacture of iron and steel and other commodities, and almost exclusively for the production of steam in large quantities. The more the question is considered and discussed the more obviously without foundation is the position of the Plaintiff in Error.

To say that there is "practical identity in the origin, structure, method of production and physical characteristics of anthracite and bituminous" is to disregard a large part of the record on which this case is submitted.

(7)

It had seemed to us that for the reasons pointed out in Section I of this argument and other reasons quite obvious there were very substantial grounds of public policy to sustain the separate classification of anthracite and bituminous coal for taxing purposes. We have pointed out that while in taxing anthracite we are taxing fuel and nothing else, a tax on bituminous would be a tax on coke and through it on the great metal industry, as well as a tax on the numerous important products, every day becoming more numerous and important, for which bituminous coal is the raw material. We would be taxing great industries of many kinds.

Another consideration of public policy which it seems appropriate to consider in making our se-

lection among the products of the State for taxing purposes is the conceded fact that Pennsylvania produces practically all the anthracite produced on this Continent. Therefore, when anthracite goes into the markets of the world it meets nothing of its own kind anywhere on the Continent. Bituminous, on the other hand, must meet the competition from many other parts of the country and must meet coal from other States even in the Pennsylvania market. Anthracite has this great advantage over bituminous, and is thus better able to bear even this light tax.

But all the manifest considerations of public policy which seemed clear to us are swept aside by Counsel for the Plaintiff in Error by saying (page 44) :—

“The fact that Governor Sproul asked for a tax on both shows that considerations of public policy are not at the basis of the classification that has been made,”

and the suggestion appears all through the argument that taxing anthracite alone is invalid because the Governor suggested a tax on anthracite and bituminous alike. It is a principle handed down to us that the main voice in selecting the objects of taxation shall be that which is closest to the people—the House of Representatives. To condemn and even attack the constitutionality of an Act because it differs from that which the Governor recommended—from the policies of the Executive—is in harmony with some tendencies of modern thought, but not with any principle generally accepted as yet.

It is worth notice, however, that in Counsel's quotation from the Governor's message (p. 4) it appears that his recommendation of a tax on bituminous was based on the belief that the former decision of the Supreme Court of Pennsylvania precluded a tax on anthracite alone. There is no indication that he did not think such a tax would be sound public policy. He was not aware of the false basis on which the Alden and St. Clair cases had been decided. After full consideration of the whole matter the Legislature reached a different conclusion, passing the Act as it now stands, with the Governor's approval.

Respectfully submitted,

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Deputy Attorney General.

GEO. ROSS HULL,
First Deputy Attorney General.

GEORGE E. ALTMER,
Attorney General.

For Defendants in Error.